(27,754)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 397.

WILLIAM HOLLIS AND SAM GOODMAN, APPELLANTS,

vs.

CHARLES W. KUTZ, CHAIRMAN; LOUIS BROWNLOW AND W. GWYNN GARDINER, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, AND AS SUCH CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, AND THE WASHINGTON GAS LIGHT COMPANY.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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Court of Appeals of the District of Columbia.

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a Supreme Court of the District of Columbia.

Equity. No. 36788.

WILLIAM HOLLIS and SAM GOODMAN, Plaintiffs,

vs.

CHARLES W. KUTZ, Chairman; LOUIS BROWNLOW and W. GWYNN Gardiner, Commissioners of the District of Columbia, and as Such Constituting the Public Utilities Commission of the District of Columbia, and The Washington Gas Light Company, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:

No. 3296.

WILLIAM HOLLIS et al., Appellants,

vs.

CHARLES W. KUTZ et al.

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1 *Bill for Injunction.*

Filed May 15, 1919.

In the Supreme Court of the District of Columbia.

Equity. No. 36788.

WILLIAM HOLLIS and SAM GOODMAN, Plaintiffs,

vs.

CHARLES W. KUTZ, Chairman; LOUIS BROWNLOW and W. GWYNN Gardiner, Commissioners of the District of Columbia and as such Constituting the Public Utilities Commission of the District of Columbia, and The Washington Gas Light Company, Defendants.

To the Supreme Court of the District of Columbia, holding an Equity Court for the said District of Columbia:

The Bill of Complaint of William Hollis and Sam Goodman, the above named plaintiffs, shows to the court as follows:

1. The plaintiff, William Hollis, is a citizen and resident of the District of Columbia and is engaged in the manufacture and sale of candy in said District at his store at 322 Cedar Street, Takoma Park, and in the conduct of such business is a user and private consumer of gas for lighting and heating purposes at said 322 Cedar Street, said gas being furnished by the defendant, The Washington Gas Light Company.

2. The plaintiff, Sam Goodman, is a citizen and resident of the District of Columbia, living at 339 Cedar Street, Takoma Park, in said District, and is engaged in the tailoring, cleaning and pressing business at his establishment at 6912—4th Street in Takoma Park, District of Columbia, and, at his aforesaid residence, and
2 in the conduct of his business at the aforesaid 6912—4th Street, is a user and private consumer of gas for lighting and heating purposes, said gas being furnished by the defendant, The Washington Gas Light Company.

3. That said plaintiffs, William Hollis and Sam Goodman, bring this suit under and by virtue of Paragraph 64 of Section 8 of an

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Act of Congress of March 4, 1913, entitled "An Act Making Appropriations for the Expenses of the Government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for Other Purposes."

4. That the defendants, Charles W. Kutz, Louis Brownlow and W. Gwynn Gardiner, are the duly appointed and qualified Commissioners of the District of Columbia, and, by virtue of their said positions, are made by Section 8 of the Act of Congress of March 4, 1913, aforesaid, The Public Utilities Commission of the District of Columbia, and the said Charles W. Kutz, Louis Brownlow and W. Gwynn Gardiner have duly qualified as the said Public Utilities Commission, and are sued as such Commissioners.

5. That the defendant, The Washington Gas Light Company, is a corporation organized and doing business under an Act of Congress of July 8, 1848, having an office and place of business in the District of Columbia, and, as such, engaged in the manufacture and dispensing of gas for lighting, heating, power and other purposes in the District of Columbia, and is a public utility as defined by Section 8 of the Act of Congress of March 4, 1913, aforesaid.

6. That by an Act of Congress of September 1, 1916, Chap. 433, 39 Stat. L., 676, entitled "An Act Making Appropriations
3 for the Expenses of the Government of the District of Columbia for the fiscal year ending June 30, 1917, and for Other Purposes," it is provided as follows:

Sec. 6. That hereafter no part of any money appropriated by this or any other act shall be used for the payment to the Washington Gas Light Company or the Georgetown Gas Light Company for any gas furnished by said companies for use in any of the public buildings of the United States or the District of Columbia at a rate in excess of 70 cents per 1000 cubic feet.

On and after the first day of October, 1916, the Washington Gas Light Company shall not charge or collect for gas furnished a private consumer in any part of the District of Columbia at a rate in excess of 75 cents per 1,000 cubic feet of gas so furnished: Provided, That if a consumer of gas other than the Government or the District of Columbia shall not pay monthly any gas bill within ten days after the same shall have been presented, said gas company may charge and collect from any such consumer so failing to pay said gas bill as aforesaid 10 cents additional for each 1,000 cubic feet of gas represented by said bill: And provided further, That nothing herein contained shall be construed as limiting or taking away any of the powers now vested by law in the Public Utilities Commission of the District of Columbia.

7. That on December 1, 1917, the defendant, The Washington Gas Light Company on its own behalf and on behalf of the Georgetown Gas Light Company, all of whose stock is owned by The Washington Gas Light Company, under and by virtue of said Act of

March 4, 1913, petitioned the Public Utilities Commission of the District of Columbia for an advance in the rates then being charged by said Washington Gas Light Company and fixed by statute as above set out, for gas furnished to consumers in the District of Columbia to a proposed rate named in said petition of $1.10 per thousand cubic feet.

8. That on December 18, 1917, a public hearing was held on the aforesaid application for advance in rates in what was designated as Formal Case No. 13, at which hearing the defendant, The Washington Gas Light Company, introduced evidence as to
4 operations and expenditures upon which justification for the proposed advance in rates were based.

9. That additional hearings in said Case No. 13 were held on February 9, 11, 12 and 16, 1918.

10. That at said hearing in Formal Case No. 13 on December 18, 1917, it was urged by Mr. Benjamin S. Minor, representing the Washington Gas Light Company, as follows (p. 12 Trans.):

"If we continue under the 73½ cent rate—75 cents to the public and 70 cents to the United States and District of Columbia, which gives us an average of only 73½ cents per M. cubic feet—we will not be able to make our operating expenses. In fact, based upon the estimates we have for 1918, it will cost us 79½ cents, or practically so, to manufacture gas and deliver it to the burner, which includes only operating costs, taxes and maintainence, with nothing left for dividends to stockholders or interest to bond holders."

11. That on March 15, 1918, the Public Utilities Commission, through its Secretary, Walter C. Allen, filed its report and decision in said case No. 13, and issued its order therein, No. 254, increasing the rate permitted to be charged for gas furnished by the defendant, the Washington Gas Light Company, and by the Georgetown Gas Light Company to any private consumer in the District of Columbia for lighting, heating, power, or for any other purpose, from the statutory rate of 75 cents aforesaid, to a rate of 90 cents per thousand cubic feet, a copy of which order, No. 254, is herewith filed, marked "Exhibit A," and prayed to be read as a part hereof.

12. That on November 21, 1918, the defendant, The Washington Gas Light Company, on behalf of itself and on behalf of the Georgetown Gas Light Company, all of whose stock is owned by the former company, under and by virtue of said Act of March 4, 1913, petitioned John G. D. Knight, Louis Brownlow and W. Gwynn Gardiner, then constituting the Public Utilities
5 Commission of the District of Columbia, for an additional advance in the rate charged for gas in the District of Columbia, from the aforesaid rate of 90 cents per thousand cubic feet, authorized by the aforesaid order, No. 254, of the Public Utilities

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Commission, to a rate proposed in said petition of $1.10 per thousand cubic feet of gas sold in said District of Columbia.

13. That on December 10, 1918, a public hearing was held on the said application of November 21, 1918, in what was designated as Formal Case No. 70, and at which hearing the defendant, the Washington Gas Light Company, submitted statements showing the cost of manufacturing gas during the year 1918, made up of actual cost for the first nine months of that year and an estimated cost for the balance of the year. An additional hearing was held in said Formal Case No. 70 on March 7, 1919, at which revised statements were furnished by the defendant, the Washington Gas Light Company, showing actual results and costs of operation for the entire year of 1918.

14. That at said hearing in Formal Case No. 70, on December 10, 1918, it appeared from Exhibit 3 of the said Washington Gas Light Company, a copy of which is herewith filed, marked "Exhibit B," and prayed to be read as a part hereof, that

(a) The total sales of gas for the first nine months of the year 1918 in the District of Columbia, for United States buildings, municipal purposes, park lamps and street lamps, amounted to 187,844,000 cubic feet, the average price for which was 52.15 cents per thousand;

6 (b) The total sales to other companies in the District amounted to 168,592,000 cubic feet, the average price for which was 51.32 cents per thousand;

(c) The total sales in the District for said period, including those to private consumers, amounted to 2,908,701,000 cubic feet, at an average price of 80.53 cents per thousand cubic feet.

15. That at said hearing in Formal case No. 70, it also appeared (Trans. p. 45), that if the private consumer of gas in the District had paid 90 cents per thousand cubic feet throughout the year 1918, and had the United States Government and the District Government paid the same rate instead of the rate actually paid, the defendant gas company would have made expenses and received a return of approximately 6 per cent.

16. That on March 15, 1919, the Public Utilities Commission, through defendants, Charles W. Kutz and W. Gwynn Gardiner, Commissioners of the District of Columbia, filed its report and decision in said case No. 70, and issued its order therein, No. 314, increasing the rate permitted to be charged for gas furnished by the defendant, The Washington Gas Light Company and by the Georgetown Gas Light Company, to any private consumer in the District of Columbia for lighting, heating, power, or for any other purposes, to a price not to exceed 95 cents per thousand cubic feet, a copy of which order, No. 314, is filed herewith, marked "Exhibit C," and prayed to be read as a part hereof.

17. That on December 10, 1918, at the hearing before the Public Utilities Commission in Formal Case No. 70, aforesaid, there was entered the appearance of a certain Roscoe F. Walter in
7 opposition to the proposed increase in gas rates in such case, the same appearing on behalf of himself, and certain others, citizens of Takoma Park, District of Columbia.

18. That just previous to the close of said hearing in Case No. 70 on said date, December 10, 1918, it was concluded by said Commission that an additional hearing in said case would be held, the exact date for which was later to be determined by said Commission.

19. That at various times subsequent to December 10, 1918, and prior to March 1, 1919, the said Roscoe F. Walter called at the office of the Secretary of said Commission to ascertain the date on which the additional hearing in said case would be held, and at each time was advised by the Secretary that such date had not then been fixed.

20. That after said Roscoe F. Walter had called a number of times at the office of the Secretary of said Commission to ascertain when the proposed additional hearing in said case would be held and was unable to secure such information as stated aforesaid, he explained to the Secretary that the duties of the said Roscoe F. Walter as an employee of the Interstate Commerce Commission often called him away from the City of Washington and for this reason desired to ascertain as nearly as possible when the proposed additional hearing would be held.

21. That thereupon the said Roscoe F. Walter was told by the Secretary of the Public Utilities Commission that the date for the proposed additional hearing in Case No. 70 had not yet been fixed, but was advised that when such date had been fixed, the said
8 Roscoe F. Walter would be given ten days' notice in advance of the time set for such hearing.

22. That, relying on such advice, the said Roscoe F. Walter directed no further inquiry to the office of the Secretary of said Commission as to when the proposed additional hearing in said case No. 70 would be held, and left Washington, D. C., on March 1, 1919, on official business for the Interstate Commerce Commission, going as far as Santa Fe, N. M., and returning to Washington on April 2, 1919.

23. That no notice of the date fixed for the additional hearing in said case was furnished by said Commission to the said Roscoe F. Walter, and the same did not know, or have any opportunity to know, of such date until his return to Washington on the date aforesaid, and as a result of not obtaining such notice was precluded from being present at said hearing and from having an opportunity to be heard on the issues involved in such hearing.

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24. That the plaintiff, William A. Hollis, between the effective dates of the aforesaid orders of the Public Utilities Commission, Nos. 254 and 314, to wit: March 20, 1918, and March 20, 1919, respectively, was a private consumer of gas furnished to him in the District of Columbia by the defendant, the Washington Gas Light Company, to the extent of 112,500 cubic feet, and pursuant to the provisions of said order No. 254 of said Commission, and to the charge for such gas made by said gas company in pursuance of said order, was forced to pay to said Washington Gas Light Company for such gas at the rate of 90 cents per thousand cubic feet of gas so furnished, amounting in all to the sum of $101.25, as appears from plaintiff's "Exhibit D," herewith filed and prayed to be read as a part hereof.

9 25. That the plaintiff, William A. Hollis, between the effective date of the aforesaid order No. 314 of the Public Utilities Commission, to wit: March 20, 1919, and April 20, 1919, was a private consumer of gas furnished to him in the District of Columbia by the defendant, The Washington Gas Light Company, to the extent of 11,400 cubic feet, and pursuant to the requirements of said order No. 314 of said Commission and to the charge for such gas by said gas company, made in pursuance of said order, was forced to pay to the said Washington Gas Light Company for such gas at the rate of 95 cents per thousand cubic feet of gas so furnished, amounting to the sum of $10.83, as appears from plaintiff's "Exhibit D," aforesaid.

26. That the plaintiff, Sam Goodman, between the effective dates of the aforesaid orders of the said Public Utilities Commission, Nos. 254 and 314, to-wit: March 20, 1918, and March 20, 1919, respectively, was a private consumer of gas furnished to him in the District of Columbia by the defendant, the Washington Gas Light Company, to the extent of 263,400 cubic feet, and pursuant to the requirements of said order No. 254 of said Commission and to the charge for such gas by said gas company made in pursuance of said order, was forced to pay to said Washington Gas Light Company for such gas at the rate of 90 cents per thousand cubic feet of gas so furnished, amounting in all to the sum of $237.24 as appears from plaintiff's "Exhibit D," aforesaid.

27. That the plaintiff, Sam Goodman, between the effective date of the aforesaid order No. 314 of the said Public Utilities Commission, to wit: March 20, 1919, and April 19, 1919, was a private consumer of gas furnished to him in the District of Columbia by the defendant, The Washington Gas Light Company, to the extent of 24,100 cubic feet, and pursuant to the requirements of said order No. 314 of said Commission, and to the charge for such gas by said gas company made in pursuance of said order, was forced to pay to said Washington Gas Light Company for such gas at the rate of 95 cents per thousand cubic feet of gas

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so furnished, amounting in all to the sum of $22.90, as appears from plaintiff's "Exhibit D," aforesaid.

Plaintiffs, therefore, aver:

28. That said Public Utilities Commission by neither of said orders, Nos. 254 and 314, nor by any other order, has increased or undertaken to increase the rate to be charged consumers of gas in the District of Columbia, other than that charged to the private consumers, and fixed by the statute aforesaid at 75 cents per thousand cubic feet.

29. That said orders, Nos. 254 and 314, of the Public Utilities Commission aforesaid, are and were unlawful and null and void, ab initio, for the reason that the same were not made in accordance with the requirements of the aforesaid statute of March 4, 1913, in that said orders undertake to increase the rate to be charged private consumers for gas furnished them in the District of Columbia, from the statutory rate of 75 cents per thousand cubic feet to 90 cents in order No. 254, and therefrom to 95 cents in order No. 314, and without regard to the fact that the rate to be charged the United States Government, the District of Columbia, and other consumers not included in the term "private consumers" was not also increased, the rate to the United States Government and
11 to the District Government remaining as provided in the statute of March 4, 1913, aforesaid, at 70 cents per thousand cubic feet.

30. That said orders, Nos. 254 and 314 of the Public Utilities Commission aforesaid are unlawful, confiscatory, and in violation of the Federal Constitution in that such orders attempt to increase the rate to be charged to the private consumers in order that the defendant, The Washington Gas Light Company, and The Georgetown Gas Light Company, may receive a reasonable income on the valuation of their properties, and thereby be enabled to sustain their credit, and conduct their business at a reasonable profit, while at the same time the rate to be charged for gas furnished to the United States Government and to the Government of the District of Columbia remains at 70 cents per thousand cubic feet, and resulting in the condition that any loss to the gas companies by reason of their being required to furnish gas to the United States and the District of Columbia at the rate of 70 cents per thousand cubic feet, shall be made up by the private consumers of gas in the District of Columbia.

31. That said orders, Nos. 254 and 314, of the Public Utilities Commission aforesaid are unlawful, null and void, ab initio, unreasonable, discriminatory and unconstitutional for the reasons above stated, and for the additional reason that it appears that said orders were made for the purpose of guaranteeing to the gas companies aforesaid a reasonable profit on their investments and to make up for losses sustained by them by reason of large amounts of their

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product being sold to consumers in the District, other than private consumers, at a price far below the 70 cent rate provided by the statute aforesaid as to the United States and District Governments.

12 32. That said orders, Nos. 254 and 314, of the Public Utilities Commission aforesaid are unlawful and null and void, ab initio, for the reason that the provisions of the Act of March 4, 1913, aforesaid, giving to the Public Utilities Commission of the District of Columbia the power to regulate, fix and determine reasonable rates to be charged by public utilities for their respective products, service, etc., in the District of Columbia, do not authorize said Commission to increase the rate to private consumers or individuals receiving such product, service, etc., and at the same time not regulate, fix and determine the price to be charged the United States Government and the District of Columbia.

33. That said orders, Nos. 254 and 314, of the said Public Utilities Commission are unlawful and null and void, ab initio, for the reason that the provisions of the Act of March 4, 1913, aforesaid, giving to said Public Utilities Commission the power to regulate, fix and determine reasonable rates to be charged by the public utilities in the District of Columbia for their respective products, service, etc., require that such regulation shall extend to all consumers and individuals receiving such product, service, etc., except those conducting a like business for a like and contemporaneous service.

34. That said order, No. 314, is unlawful and null and void, ab initio, for the additional reason that it was not made in accordance with the provisions and requirements of the aforesaid statute of March 4, 1913, in that it was made without the statutory notice provided therein, having been given to all parties to the hearing in Formal Case No. 70, and having an interest in the matters therein involved and who had caused to have entered their appear-
13 ances in said case, and without all of said parties having an opportunity to be heard in said case.

The Premises Considered, Wherefore, Plaintiffs Pray:

(*a*) That a writ of subpœna issue out of the Clerk's office of this Honorable Court directing the defendants, the said Charles W. Kutz, Louis Brownlow and W. Gwynn Gardiner, Commissioners of the District of Columbia, and as such constituting the Public Utilities Commission of said District, and the said Washington Gas Light Company to appear herein on a day certain and then and there truly and completely to answer, but not under oath (an answer under oath being expressly waived), the exigency of this bill.

(*b*) That the said defendants, Charles W. Kutz, Louis Brownlow and W. Gwynn Gardiner, Commissioners of the District of Columbia, and as such constituting the Public Utilities Commission of said District, be required to cause a certified transcript of all proceed-

ings had and testimony taken in connection with the investigations in the aforesaid Formal Cases, Nos. 13 and 70, and the issuance of said orders in said cases, Nos. 254 and 314, respectively, to be filed with the Clerk of the Supreme Court of the District of Columbia, in accordance with Paragraph 52 of Section 8 of the aforesaid Act of March 4, 1913.

(*c*) That the said defendants, Commissioners of the District of Columbia, be required to furnish to the plaintiffs free of cost a copy of the certified transcript of all proceedings had and testimony taken in connection with said investigations in Formal Cases Nos. 13 and 70, in accordance with Paragraph 53 of Section 8 of the aforesaid Act of March 4, 1913.

14 (*d*) That said orders, Nos. 254 and 314, of the Public Utilities Commission, aforesaid, by decree of this Honorable Court be vacated and set aside, as unlawful, void and without legal effect, as provided by Section 8 of the aforesaid Act of March 4, 1913.

(*e*) That the defendant, the Washington Gas Light Company, be perpetually enjoined from charging for its gas furnished to private consumers in the District of Columbia any price in excess of that provided in the aforesaid Act of Congress of September 1, 1916, to wit: 75 cents per thousand cubic feet.

(*f*) That the defendant, The Washington Gas Light Company, be required to refund to the plaintiff, William A. Hollis, the amount of money that said plaintiff was forced to pay above the statutory rate of 75 cents per thousand cubic feet, on the amounts of gas furnished by said defendant to said plaintiff in the District of Columbia, as appears in plaintiff's "Exhibit D", aforesaid, and amounting in all to 112,500 cubic feet at 90 cents per thousand cubic feet, and 11,400 cubic feet at 95 cents per thousand cubic feet, to wit: $19.92, with interest to date on the respective amounts of charges above the 75-cent rate making up said $19.92, from the dates of payment thereof.

(*g*) That the defendant, The Washington Gas Light Company, be required to refund to the plaintiff, Sam Goodman, the amount of money that said plaintiff was forced to pay above the statutory rate of 75 cents per thousand cubic feet, on the amounts of gas furnished by said defendant to said plaintiff in the District of Columbia, as appears in plaintiff's "Exhibit D", and amounting in all to 263,400 cubic feet at 90 cents per thousand cubic
15 feet, and 24,100 cubic feet at 95 cents per thousand cubic feet, to wit: $45.26 with interest to date on the respective amounts of charges above the 75-cent rate making up said $45.26, from the dates of payment thereof.

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(*h*) And that the plaintiffs have such other and further relief as the nature of this case may require and to this Honorable Court may seem meet and proper.

WM. HOLLIS,
SAM. GOODMAN,
Plaintiffs.

ROSCOE F. WALTER,
Attorney for Plaintiffs.

DISTRICT OF COLUMBIA, *ss:*

I, Sam Goodman, on oath say that I am plaintiff in the foregoing bill; that I have read the said bill and know the contents thereof; that the allegations therein set forth are true.

SAM. GOODMAN.

Subscribed and sworn to before me this 14 day of May, 1919.
[SEAL.] WILLIAM K. HILL,
Notary Public, District of Columbia.

16 EXHIBIT A.

Public Utilities Commission of the District of Columbia.

Order No. 254.

Copy.

Formal Case No. 13.

March 15, 1918.

In the Matter of Application of the WASHINGTON GAS LIGHT COMPANY and the GEORGETOWN GAS LIGHT COMPANY for an Increase in Rates.

By the Commission: On December 1, 1917, the Washington Gas Light Company on its own behalf and on behalf of the Georgetown Gas Light Company, all of whose stock is owned by the Washington Gas Light Company, petitioned this Commission for an increase in the rate to be charged by it for gas furnished to consumers in the District of Columbia. The company presented with its petition a detailed analysis of its operations during the year ended September 31, 1917, and the estimated cost of manufacturing and delivering gas during the year ending December 31, 1918, claiming those figures showed that at the present rates for gas, the company would operate at a loss.

A public hearing was held on December 18, 1917, at which hearing the company formally presented its petition and introduced the evidence of the experts who had made the analysis of its operations and expenditures upon which its petition was based. The testimony and exhibits were carefully studied by the Commission's experts, who made a thorough examination of the books and accounts of the com-

pany. At the hearings on February 9, 11, 12 and 16, 1918, the results of their investigations were introduced in evidential
17 form and the company subjected them to a thorough cross-examination.

The evidence shows that the costs of coal at the mine during 1917 increased from $4.55 to $5.65 per ton, and oil from 4.4 cents per gallon to 8 cents at present quotations and that the cost of labor and material for maintenance and distribution has also greatly increased.

The manufacture of gas for heat and illumination is substantially the conversion of fuel from one form into another. The fuel thus converted consists of coal and oil which are the raw materials from which gas is made and the cost of these two raw materials (as shown by the actual costs during the year ended September 30, 1917) represents approximately eighty per cent of the manufactured gas. It is self-evident that when the cost of coal to the gas manufacturer increases twenty-five per cent and the cost of oil eighty-two per cent, that the cost of the manufactured gas will increase in approximately a similar proportion so far as these basic elements are concerned, and will be further increased if the cost of labor and maintenance has also risen. All of these conditions have taken place while the selling price of gas has remained stationary.

In view of all these considerations, the Commission feels that it would be unmindful of its plain duty if it refused to grant such measure of relief as existing conditions not only show to be proper, but thoroughly justified.

In view of the fact that an appeal is now pending from the former valuation of the properties of the two companies heretofore made by this Commission; in order to preserve in all respects the in-
18 terests of the public should it appear by any proceeding that an increase in rates should not have been allowed by the Commission at this time, the Commission has required of the company and the company has filed with the Commission its agreement over the signature of its President which said agreement is as follows:

"In the matter of its application for an increase in the price to be charged for gas, in consequence of the conditions shown by the evidence taken under it, and in order to obviate any obstacle which it has been suggested may exist by reason of the pending appeal from the order fixing the valuation of its property, the Washington Gas Light Company states its willingness to accept that valuation as the basis for such rate as the Commission may fix under the Company's pending application, to be binding upon it as the correct valuation, without prejudice to and notwithstanding the appeal, for such period of time as the rate which the Commission shall fix under the said application shall continue.

The Gas Company further agrees that if it shall appear from the final decision in the valuation appeal case now pending in the Supreme Court of the District of Columbia, or otherwise, that the existing rate which it is permitted to charge to consumers of gas could or should not legally have been increased, the Company will refund to the consumers any difference between the existing rate and the increased rate which the Commission shall find to be proper."

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The Commission believes that by this agreement the public is protected by every safeguard within the power of the Commission to require.

The increase in the cost of production has been occasioned by conditions brought about by the war and has imposed a burden which must be borne by both producer and consumer and so distributed as to be equitable to both. Under the conditions which have arisen because of an unprecedented situation, and in view of all the circumstances of the case, and after giving the rights of the company and of the citizens the most careful study, the Commission feels that the fixing of a price for gas which would yield approximately a six per cent return to the company on the Commission's valuation of
19 its property will enable the company to sustain its credit and conduct its business at a reasonable profit, and that the increased cost to the consumer should be cheerfully accepted as his share of an unavoidable burden.

It being the opinion of the Commission, that the circumstances justify an increase in the rate to be charged for gas, it is, therefore—

Ordered:

(1) That the rate to be charged for gas furnished by any public utility to any private consumer in the District of Columbia for lighting, heating, power, or for any other purpose, shall not exceed ninety (90) cents per thousand cubic feet.

(2) That this rate shall apply uniformly to all private consumers in the said District of Columbia, whether supplied with gas by the Washington Gas Light Company or by the Georgetown Gas Light Company.

(3) That if any private consumer of gas shall not pay monthly any gas bill within ten days after the same shall have been presented, the gas company supplying gas to such consumer may charge and collect from said consumer so failing to pay said gas bill as aforesaid ten (10) cents additional for each one thousand (1000) cubic feet of gas represented by said bill, as now required by law.

(4) That the quality and pressure of gas furnished by the said Washington Gas Light Company and by the said Georgetown Gas Light Company shall at all times comply with the standards now prescribed therefor by this Commission.

(5) That this rate shall apply to all gas furnished after
20 March 20, 1918, and shall continue in force until changed by the Commission.

A true copy:

WALTER C. ALLEN,
Executive Secretary.

W. C. A./H. B.

EXHIBIT B.

P. U. C. No. 2431/22.

Copy.

Exhibit 3.

Washington Gas Light Company.

Statement of Sales of Gas to Private Consumers, to the District of Columbia and to other companies for the nine months ended September 30, 1918, showing the average price received from each group and the average price received for all gas sold.

Sales of Gas.

Nine Months Ended September 30, 1918.

Private Consumers:

	M. cu. ft.	Amount.	Average price, cents per M.
Ordinary and Prepayment Meters	2,552,265	$2,157,999.90	84.55
District of Columbia:			
U. S. Buildings	59,160	42,734.41	72.23
Municipal purposes	12,516	8,729.88	69.75
Park Lamps	4,066	1,457.73	35.85
Street Lamps	112,102	45,044.02	40.18
Total, D. C.	187,844	97,966.04	52.15
Other Companies	168,592	86,516.04	51.32
Total D. C. and Other Companies	356,436	184,482.08	51.76
Total Sales	2,908,701	$2,342,481.98	80 53

NOTES.—1. The above tabulation shows that 356,436 M. cubic feet, or 12.25 per cent of the total, was sold at a price slightly less than 52 cents per M.

2. The rate of 90 cents per thousand to private consumers took effect April 1, 1918. The gas sold in January, February, and March, 1918, at the 75-cent rate was 1,039,532,400 cu. ft.

21 If the 90-cent rate had been in effect from January 1, 1918, the increased income would have been $155,929.86 (1,039,-532.4 x .15), the to-al income from gas would have been $2,498,-411.84 and the average price 85.89 cents per M.

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EXHIBIT C.

P. U. C., No. 2431/28.

Public Utilties Commission of the District of Columbia.

Order No. 314.

Copy.

March 15, 1919.

Formal Case No. 70.

In the Matter of the Application of the WASHINGTON GAS LIGHT COMPANY for an Increase in Rates.

By the Commission: On November 21st, 1918, the Washington Gas Light Company on behalf of itself and on behalf of the Georgetown Gas Light Company, petitioned this Commission for an increase in the rate charged for gas furnished to private consumers in the District of Columbia, claiming that the income received in 1918 was inadequate for the proper operation of plants, maintenance of credit, and a return of six per cent on the fair value of their properties, as fixed by this Commission.

On October 1st, 1916, the price of gas to private consumers in the District of Columbia was fixed by Act of Congress at seventy-five cents per thousand cubic feet. The price was increased to ninety cents per thousand cubic feet on March 15th, 1918, by Order No. 254, issued by this Commission. This increase was based upon an estimate that the new rate would yield a return to the companies of approximately six per cent on the fair value of the properties
22 of these companies as determined by the Commission.

At a public hearing on the present application, December 10th, 1918, the Washington Gas Light Company submitted statements showing cost of manufacture for 1918, made up of actual cost for the first nine months of the year and estimated cost for the balance of the year. At the subsequent hearing March 7th, 1919, revised statements were presented giving the actual results for the year 1918. These statements, which have been carefully examined and verified by the accountants of the Commission, show the net income of the Washington Gas Light Company for the year to have been $503,287.22, yielding a return of approximately five per cent on the fair value of the property of the two companies as determined by the Commission and brought down to the year 1918.

The Commission has delayed rendering a decision in this case in the hope that the abnormally high cost of manufacture resulting from the war would be materially reduced as a result of the signing of the armistice, but the evidence shows that so far there has been no material reduction.

In its decision in the Potomac Electric Power Company's rate case,

Order No. 223, the Commission held that rates which would yield a return of seven per cent on the fair value of the property of the company that was used and useful in the service of the public, were just and reasonable. The business of manufacturing and distributing gas, as far as risk to the investor is concerned, is quite similar to that of manufacturing and distributing electric current for light and power, so that if seven per cent represents a fair rate of return for an electric power company, a similar rate should be allowed
23 for a gas company. Under the present abnormal conditions, however, the Commission feels that the burdens imposed by the war should not be borne wholly by the consumer, but should be divided between the utility and the consumer. Therefore, while the Commission adheres to its opinion that under normal conditions a seven per cent return should be allowed gas and electric companies in order that capital for necessary extensions may be readily obtained, it is also of the opinion that until normal conditions are restored, rates for service of this character which will yield a return of six per cent are reasonable and in no sense confiscatory.

In determining the price to be charged to private consumers that will yield a return to the companies of six per cent, it is necessary to make certain assumptions, so that in compiling the following table, the Commission assumes that the demand for gas in the next six months will not be less than it was during the corresponding period last year; that the price of labor will be equal to the average price paid during 1918, and that the present prices of coal and oil will be maintained.

Basis for Rate.

Charges.

	Washington Gas Light Company.	Georgetown Gas Light Company.	Combined Companies.
Operating Expenses 1918	$2,780,577.81	$228,749.12	$3,009,326.93
Taxes, 1918	151,882.13	9,827.46	161,709.59
Increased Cost of Coal	61,009.29	1,723.71	62,793.00
Increased Cost of Oil	148,525.42	3,333.47	151,858.89
Return of 6% on Fair Value brought up to Dec. 31, 1918	577,421.80	52,738.35	630,160.15
Total charges	$3,719,476.45	$296,372.11	$4,015,848.56

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24 Credits.

	Washington Gas Light Company.	Georgetown Gas Light Company.	Combined Companies.
Residuals, etc.	$83,141.09	$10,834.23	$93,975.32
Sales to U. S. and District	134,183.21	11,081.29	145,264.50
Sales to other Companies	9,403.92	32,822.33	42,226.25
Intercompany Sales ...	.....	112,827.53	112,827.53
Total credits	$226,728.22	$167,565.38	$394,293.60

91 Net cost to consumers:

3,814,912,000 cu. ft. @ $.9493 per thousand $3,621,554.96

This table shows, that under the above assumption, the companies must receive 95 cents per thousand cubic feet for all gas sold to private consumers in order to yield a return of six per cent. In the opinion of the Commission, this price is just and reasonable for a limited period not exceeding six months. It is true that it ignores a probable reduction in the price of oil and coal before the expiration of the six months' period, but on the other hand it makes no allowance for the difference between what the companies actually earned since January 1st, 1918, and what they would have earned had the rates been sufficient to yield a six per cent return during that period.

It is, therefore—

Ordered:

(1.) That the rate to be charged for gas furnished by any public utility to any private consumer in the District of Columbia, for lighting, heating, power, or for any other purpose, shall not exceed ninety-five cents per one thousand cubic feet.

(2.) That this rate shall apply uniformly to all private consumers in the District of Columbia, whether supplied with gas by the
25 Washington Gas Light Company or by the Georgetown Gas Light Company.

(3.) That if any private consumer of gas shall not pay monthly any gas bill within ten days after the same shall have been presented, the gas company may charge and collect from said consumer ten (10) cents additional for each one thousand (1000) cubic feet of gas represented by said bill, as now required by law.

(4.) That this rate shall apply to all gas furnished from March 20, 1919, to September 20th, 1919.

(5.) That on September 20th, 1919, the rate shall be restored automatically to ninety cents per one thousand cubic feet, unless on or before said date the Commission shall have ordered otherwise.

[SEAL.] C. W. KUTZ,
W. GWYNN GARDINER,
Public Utilities Commission of the District of Columbia.

A true copy:

_____,
Executive Secretary.

26 EXHIBIT D.

Statement Showing Amounts of Gas Used Monthly By Plaintiffs Hollis and Goodman Since the Effective Dates of the 90 and 95 Cent Rates and the Dates of Payment and Amount of Gas Bills Paid under Those Dates.

William A. Hollis.

Month in which gas consumed.	Amount in cubic feet.	Rate per M. Cents.	Amount of bill.	When bill was paid.
Mar. 28 to Apr. 27	8,000	90	$7.20	May 14, 1918.
Apr. 27 to May 29	5,400	90	4.86	June 12, 1918.
May 29 to June 29	4,300	90	3.87	July 9, 1918.
June 29 to July 29	2,700	90	2.43	Aug. 10, 1918.
July 29 to Aug. 29	3,000	90	2.70	Sept. 10, 1918.
Aug. 28 to Sept. 27	4,400	90	3.96	Oct. 11, 1918.
Sept. 27 to Oct. 29	2,500	90	2.25	Nov. 11, 1918.
Oct. 29 to Nov. 29	13,500	90	12.15	Dec. 14, 1918.
Nov. 29 to Dec. 30	18,700	90	16.83	Jan. 10, 1919.
Dec. 30 to Jan. 23	16,000	90	14.40	Feb. 5, 1919.
Jan. 23 to Feb. 19	19,000	90	17.10	Mar. 4, 1919.
Feb. 19 to Mar. 19	15,000	90	13.50	Apr. 11, 1919.
	112,500		$101.25	
Mar. 19 to Apr. 16	11,400	95	10.83	May 12, 1919.
	123,900		$112.08	

Service of copy of the above petition acknowledged this 7th day of July, 1919.

CONRAD H. SYME,
Attorney for Public Utilities Commission, District of Columbia.

Leave to Amend Bill.

Filed July 8, 1919.

* * * * * * *

Upon consideration of the motion of plaintiffs to amend their original bill filed in this cause, it is this 8th day of July, 1919,

Ordered that said plaintiffs be, and they are hereby granted leave to amend their said bill in accordance with their motion in this respect.

By the Court:

JENNINGS BAILEY,
Justice.

Amendment to Bill.

Filed July 8, 1919.

* * * * * * *

And now, July 8, 1919, plaintiffs by leave of the Court, amend their bill of complaint by substituting in lieu of paragraph 3 of their bill, the following paragraph, to wit:

3. That said plaintiffs, William Hollis and Sam Goodman, institute this their bill in equity both because they are without an adequate remedy at law, and because paragraph 64 of Section
32 8 of said Act of March 4, 1913, creating the Public Utilities Commission of the District of Columbia, expressly provides that any person interested and being dissatisfied with any order or decision of the said Commission fixing any rate or rates, tolls or charges, may commence a proceeding in equity in this honorable court, against the said Commission to vacate or set aside any such decision or order, on the ground that such rate or rates, tolls or charges complained of fixed in such order is unlawful or unreasonable.

ROSCOE F. WALTER,
Attorney for Plaintiffs.

Motion to Dismiss Amended Bill.

Filed July 8, 1919.

* * * * * * *

Now come the defendants by their attorneys and move the Court to dismiss the amended bill filed herein upon the same grounds stated in their motions to dismiss the original bill.

CONRAD SYME,
Att'y for Defendants Chas. W. Kutz, Louis Brownlow and W. Gwynn Gardiner,
BERRY & MINOR,
J. J. DARLINGTON,
Att'ys for Washington Gas Light Co.

Opinion of Court.

Filed July 8, 1919.

* * * * * * *

As to the motion to dismiss—

1. I think the first ground is well taken.

33 2. I think the plaintiffs are entitled to bring suit under paragraph 64 of the Public Utilities Act.

3. I think the third ground is well taken.

4. I do not think that the fourth ground is well taken.

5. I do not think that the fifth ground is well taken.

BAILEY, *J.*

Decree Dismissing Amended Bill.

Filed July 8, 1919.

* * * * * * *

This cause coming on to be heard on the motion made by the several defendants to dismiss the amended bill of complaint, exhibited herein, and being argued by counsel and considered by the Court, it is this 8" day of July, 1919,

Ordered that the said bill of complaint as amended be, and the same is, hereby dismissed with costs.

By the Court:

JENNINGS BAILEY,
Justice.

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From the foregoing decree the plaintiffs in open court pray for an appeal to the Court of Appeals for the District of Columbia, which is allowed and the amount of the bond for such appeal is fixed at One hundred dollars, or fifty dollars cash deposit.

JENNINGS BAILEY,
Justice.

34 *Memorandum.*

July 9, 1919.—$50 deposited in lieu of appeal bond.

Assignment of Errors.

Filed July 12, 1919.

* * * * * * *

Plaintiffs by their attorney assign the following errors to be presented on appeal in the above case:

1st. The Court erred in holding that the plaintiffs have not in their amended bill of complaint set forth facts entitling them to the relief prayed for,

2nd. The Court erred in holding that the plaintiffs' right of action sought to be enforced in their amended bill is barred by the statute of limitations as provided in Paragraph 65 of Section 8 of the Act of Congress of March 4, 1913, known as "The Public Utilities Act."

3rd. The Court erred in sustaining the motion of the defendants, filed July 8, 1919, to dismiss plaintiffs' amended bill.

ROSCOE F. WALTER,
Attorney for Plaintiffs.

Designation of Record.

Filed July 12, 1919.

* * * * * * *

In preparing the transcript of record on appeal in the above entitled cause, the Clerk will please include the following:

1. Bill of Complaint.

2. Motion of defendants, Charles W. Kutz, Louis Brown-
35 low and W. Gwynn Gardiner, to dismiss, of May 29, 1919.

3. Motion of defendant, the Washington Gas Light Company, to Dismiss, of June 3, 1919.

4. Motion of plaintiffs to Amend of July 8, 1919.

5. Order permitting Amendment of July 8, 1919.

6. Amendment to Bill of July 8, 1919.

7. Motion to Dismiss Amended Bill of July 8, 1919.

8. Opinion of Court.

9. Decree Dismissing Amended Bill with Notation of Appeal, also fixing Bond for Appeal and providing for deposit of $50.00 in lieu of bond, of July 8, 1919.

10. Memorandum of Deposit of $50.00 in lieu of Appeal Bond.

11. Assignment of Errors.

12. This Designation of Record.

ROSCOE F. WALTER,
Attorney for Plaintiffs.

36 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 35, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 36788 in Equity, wherein William Hollis and Sam Goodman are Plaintiffs and Charles W. Kutz, Chairman, &c., et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 30th day of July, 1919.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG,
Clerk,
By W. E. WILLIAMS,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 3296. William Hollis et al., appellants, vs. Charles W. Kutz et al. Court of Appeals, District of Columbia. Filed July 31, 1919. Henry W. Hodges, clerk.

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Wednesday, February 4th, A. D. 1920.

No. 3296.

WILLIAM HOLLIS and SAM GOODMAN, Appellants,

vs.

CHARLES W. KUTZ, Chairman; LOUIS BROWNLOW and W. GWYNN Gardiner, Commissioners of the District of Columbia, and as Such Constituting the Public Utilities Commission of the District of Columbia, and The Washington Gas Light Company.

On consideration of the motion to pass, submitted by Mr. J. J. Darlington of counsel for the appellees, It is ordered by the Court that said motion be and the same is hereby denied, with leave to counsel for the Public Utilities Commission to make argument herein on the first Monday of March next, if so advised.

The argument in the above entitled cause was commenced by Mr. Roscoe F. Walter, attorney for the appellants.

Thursday, February 5th, A. D. 1920.

No. 3296.

WILLIAM HOLLIS and SAM GOODMAN, Appellants,

vs.

CHARLES W. KUTZ, Chairman; LOUIS BROWNLOW and W. GWYNN Gardiner, Commissioners of the District of Columbia, and as Such Constituting the Public Utilities Commission of the District of Columbia, and The Washington Gas Light Company.

The argument in the above entitled cause was continued by Mr. Roscoe F. Walter, attorney for the appellants, and by Mr. J. J. Darlington, attorney for the appellees. On motion the appellees are allowed to file additional references, with leave to appellants to reply if so advised.

Tuesday, March 2nd, A. D. 1920.

No. 3296.

WILLIAM HOLLIS and SAM GOODMAN, Appellants,

vs.

CHARLES W. KUTZ, Chairman; LOUIS BROWNLOW and W. GWYNN Gardiner, Commissioners of the District of Columbia, and as Such Constituting the Public Utilities Commission of the District of Columbia, and The Washington Gas Light Company.

The argument in the above entitled cause was concluded by Mr. C. H. Syme, attorney for the Public Utilities Commission.

In the Court of Appeals of the District of Columbia.

No. 3296.

WILLIAM HOLLIS and SAM GOODMAN, Appellants,

vs.

CHARLES W. KUTZ, Chairman; LOUIS BROWNLOW and W. GWYNN GARDINER, Commissioners of the District of Columbia, and as Such Constituting the Public Utilities Commission of the District of Columbia, and The Washington Gas Light Company, Appellees.

Opinion.

Opinion of the Court per Mr. Justice Van Orsdel.

Appellants, plaintiffs below, filed a bill in equity in the Supreme Court of the District of Columbia against defendants, Charles W. Kutz, Louis Brownlow and W. Gwynn Gardiner, Commissioners of the District of Columbia, and, as such, constituting the Public Utilities Commission of the District, and the Washington Gas Light Company, to set aside certain orders of the commission increasing gas rates in the District of Columbia.

The proceedings complained of were had at the instance of the Washington Gas Light Company under section 8 of the act of Congress of March 4, 1913, (37 Stats. L., 974), which resulted in an order by the commission on March 15, 1918, in Formal Case No. 13, advancing the price of gas from 75¢ to 90¢ per thousand cubic feet, and a second order on March 15, 1919, in Formal Case No. 70, advancing the price from 90¢ to 95¢ per thousand cubic feet. Plaintiffs pray that a decree be entered setting aside each of these orders, and that the gas light company be required to refund to plaintiffs the amount collected from them in advance of 75¢ per thousand cubic feet, with interest, and for such further relief as the case may require.

On motion of defendants, the bill was dismissed, and from the decree this appeal was prosecuted.

The appeal can be disposed of upon a single question of jurisdiction. Plaintiffs were not parties to the proceeding before the commission. It is averred "that on December 10, 1918, at the hearing before the Public Utilities Commission in Formal Case No. 70, aforesaid, there was entered the appearance of a certain Roscoe F. Walter in opposition to the proposed increase in gas rates in such case, the same appearing on behalf of himself, and certain others, citizens of Takoma Park, District of Columbia." It is nowhere alleged that Walter represented plaintiffs either as attorney or agent, or that plaintiffs in any respect sought to intervene or object to the proceedings before the commission, or that they filed any complaint or instituted any proceeding to have the order of the commission set aside or modified. On the contrary, they allege that this suit is brought

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"under and by virtue of Paragraph 64" of the act creating the utilities commission, which provides as follows: "That any public utility and any person or corporation interested being dissatisfied with any order or decision of the commission fixing any valuation, rate or rates, tolls, charges, schedules, joint rate or rates, or regulation, requirement, act, service or other thing complained of may commence a proceeding in equity in the Supreme Court of the District of Columbia against the commission, as defendants, to vacate, set aside, or modify any such decision or order on the ground that the valuation, rate or rates, tolls, charges, schedules, joint rate or rates, or regulation, requirement, act, service or other thing complained of fixed in such order is unlawful, inadequate, or unreasonable."

The portions of the act under which proceedings may be instituted before the commission are as follows:

"Par. 38. That upon its own initiative or upon reasonable complaint made against any public utility that any of the rates, tolls, charges, or schedules, or services * * * are in any respect unreasonable or unjustly discriminatory * * * the commission may, in its discretion, proceed, with or without notice, to make such an investigation as it may deem necessary or convenient. But no order affecting said rates, tolls, charges, schedules, regulations, or act complained of shall be entered by the commission without a formal hearing.

"Par. 39. That the commission shall prior to such formal hearing notify the public utility complained of that a complaint has been made, and ten days after such notice has been given the commission may proceed to set a time and place for a hearing and an investigation as hereinafter provided.

"Par. 40. That the commission shall give the public utility and the complainant, if any, ten days' notice of the time and place when and where such hearing and investigation will be held and such matters considered and determined. Both the public utility and complainant shall be entitled to be heard and shall have process to enforce the attendance of witnesses."

It thus appears that proceedings may be instituted by the utilities commission on its own motion, or by a public utility, as in the present case, seeking a readjustment of its rates, or by an interested party, who may make a formal complaint against the utility. This right of action against the utility will lie whether the matters complained of originate with the utility or grow out of an order of the commission. In any event, however, formal complaint must be filed, hearing had, and a final order obtained from the commission, before the jurisdiction of the courts can be invoked.

The equitable proceeding in the Supreme Court of the District of Columbia under paragraph 64 is in the nature of an appeal rather than an original suit. The act contemplates that it shall be heard upon a transcript of the record made before the commission, and not alone upon evidence adduced at the trial, though additional evidence may be offered. However, if additional evidence is offered by the plaintiff, differing from that offered at the hearing, the proceedings in equity must be suspended pending further proceedings by

the commission. The procedure in this respect is defined in paragraph 67 of the act, as follows: "That if upon trial of such proceeding or suit evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the commission or its authorized agent, or additional thereto, the court before proceeding to render judgment, unless the parties to such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission, and shall stay further proceedings in said proceeding for fifteen days from the date of such transmission. Upon the receipt of such evidence the commission shall consider the same and may alter, modify, amend, or rescind its order relating to such valuation, rate or rates, tolls, charges, schedules, joint rate or rates, time schedules, regulations, act, or service complained of in said action, and shall report its action thereon to said court within ten days from receipt of such evidence."

It is not contemplated that any resident of the District, feeling himself aggrieved, may rush into the courts without first submitting his case to the utilities commission, whose duty it is primarily to hear and adjust and, if possible, finally dispose of such complaints. It follows that, in the absence of any complaint by plaintiffs, or hearing upon a formal case submitted to the commission, there is no basis for the present action.

The decree dismissing the bill is affirmed with costs.

Affirmed.

Monday, April 5th, A. D. 1920.

April Term, 1920.

No. 3296.

WILLIAM HOLLIS and SAM GOODMAN, Appellants,

vs.

CHARLES W. KUTZ, Chairman; LOUIS BROWNLOW, and W. GWYNN GARDINER, Commissioners of the District of Columbia, and as Such Constituting the Public Utilities Commission of the District of Columbia, and The Washington Gas Light Company.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

PER MR. JUSTICE VAN ORSDEL.

April 5, 1920.

Mr. Justice Robb did not sit in this case.

POOR COPY

In the Court of Appeals of the District of Columbia.

No. 3296.

WILLIAM HOLLIS and SAM GOODMAN, Appellants,

vs.

CHARLES W. KUTZ et al., Appellees.

Prayer for Allowance of Appeal.

Now come the appellants in the above-entitled cause and pray the Court for the allowance of an appeal to the Supreme Court of the United States, and ask that the bond for costs be fixed on the same. For reasons, the appellants say they believe themselves entitled to this appeal under the fifth paragraph of Section 250 of the Act to Codify the Laws Relating to the Judiciary, approved March 3, 1911.

ROSCOE F. WALTER,
Attorney for Appellants,
By HERMAN FELTER.

Endorsed: No. 3296. William Hollis et al. v. Charles W. Kutz et al. Motion for allowance of appeal to Supreme Court, U. S. Court of Appeals, District of Columbia. Filed April 15, 1920. Henry W. Hodges, Clerk.

Friday, April 16th, A. D. 1920.

No. 3296.

WILLIAM HOLLIS and SAM GOODMAN, Appellants,

vs.

CHARLES W. KUTZ, Chairman; LOUIS BROWNLOW, and W. GWYNN Gardiner, Commissioners of the District of Columbia, and as Such Constituting the Public Utilities Commission of the District of Columbia, and The Washington Gas Light Company.

On consideration of the motion for the allowance of an appeal to the Supreme Court of the United States in the above entitled cause, It is by the Court this day ordered that said appeal be and the same is hereby allowed and the bond for costs is fixed at the sum of three hundred dollars.

In the Court of Appeals, District of Columbia.

No. 3296.

WILLIAM HOLLIS and SAM GOODMAN, Appellants,

vs.

CHARLES W. KUTZ et al.

Amended Prayer for Allowance of Appeal.

Now come the appellants in the above entitled cause and pray the Court for the allowance of an appeal to the Supreme Court of the United States, and ask that a cash deposit be named in lieu of a bond for costs.

For reasons, the appellants say they believe themselves entitled to this appeal under both the fifth paragraph of Section 250 of the Act to codify the Laws Relating to the Judiciary, approved March 3, 1911, and under the 64th paragraph of Section 8 of an Act of Congress of March 4, 1913, entitled "An act making appropriations for the expenses of the Government of the District of Columbia for the fiscal year ending June 30, 1914, and for other purposes, approved March 4, 1913.

ROSCOE F. WALTER.
Attorney for Appellants.

(Endorsed:) No. 3296. William Hollis, et al., appellants, vs. Charles W. Kutz, et al. Motion to make cash deposit on appeal in lieu of bond; also to amend prayer for appeal. Court of Appeals, District of Columbia, filed Jun- 2, 1920. Henry W. Hodges, Clerk.

Wednesday, June 2nd, A. D. 1920.

No. 3296.

WILLIAM HOLLIS et al., Appellants,

vs.

CHARLES W. KUTZ, &c., et al.

The motion for leave to make a cash deposit of one hundred dollars in lieu of filing bond for costs on appeal in the above entitled cause and to amend the prayer of appeal, was submitted to the consideration of the Court by Mr. Roscoe F. Walter, attorney for the appellants, in support of motion. On consideration whereof, It is by the Court this day ordered that said motion be and the same is hereby granted.

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Memorandum.

June 3, 1920.—One hundred dollars deposited with the Clerk in lieu of bond for costs on appeal.

UNITED STATES OF AMERICA, *ss:*

To Charles W. Kutz, Chairman; Louis Brownlow and W. Gwynn Gardiner, Commissioners of the District of Columbia, and as such Constituting the Public Utilities Commission of the District of Columbia, and the Washington Gas Light Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein William Hollis and Sam Goodman are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Constantine J. Smyth, Chief Justice of the Court of Appeals of the District of Columbia, this 3rd day of June, in the year of our Lord one thousand nine hundred and twenty.

CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged:
F. H. STEPHENS,
For Com'rs.
BENJ. S. MINOR,
Per H. B. R.,
Counsel for Appellees.

[Stamped:] Court of Appeals, District of Columbia. Filed Jun. 10, 1920. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 38 inclusive constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of William Hollis and Sam Goodman, Appellants, vs. Charles W. Kutz, Chairman; Louis Brownlow and W. Gwynn Gardiner, Commissioners of the District of Columbia, and as such constituting the Public Utilities Commission of the District of Columbia, and the Washington Gas Light Company. No. 3296, April Term, 1920, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 10th day of June, A. D. 1920.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Assignments of Error.

1. The Honorable the Court of Appeals of the District of Columbia erred:

(*a*) In affirming the decree of the Supreme Court of the District of Columbia, which dismissed the plaintiffs' amended bill of complaint.

(*b*) In finding that the plaintiffs in error, plaintiffs in the Supreme Court of the District of Columbia, are not persons interested within the meaning of that term as used in paragraph 2 of Paragraph 64 of the Public Utilities Law, Section 8 of An Act Making Appropriations to Provide for the expenses of the Government of the District of Columbia for the fiscal year ending June 30, 1914, and for other purposes, approved March 4, 1913.

(*c*) In finding that the equitable proceeding in the Supreme Court of the District of Columbia, contemplated by Paragraph 64 of Section 8 of said Act of March 4, 1913, is in the nature of an appeal rather than an original suit.

(*d*) In affirming the decree of the Supreme Court of the District of Columbia, and which denied to the plaintiffs in error the relief sought by their amended bill of complaint.

[Endorsed:] File No. 27,754. Supreme Court U. S., October Term, 1919. Term No. 397. William Hollis and Sam Goodman, Appellants, vs. Charles W. Kutz, Chairman, et al. Assignment of Errors. Filed June 15, 1920.

Endorsed on cover: File No. 27,754. District of Columbia Court of Appeals. Term No. 397. William Hollis and Sam Goodman, appellants, vs. Charles W. Kutz, Chairman; Louis Brownlow, and W. Gwynn Gardiner, Commissioners of the District of Columbia, and as such constituting the Public Utilities Commission of the District of Columbia, and The Washington Gas Light Company. Filed June 15th, 1920. File No. 27,754.

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FILE COPY

Office Supreme Court, U. S.
FILED
DEC 17 1920
JAMES D. MAHER
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 397.

WILLIAM HOLLIS ET AL., *Appellants,*

v.

CHARLES W. KUTZ ET AL., *Appellees.*

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO ADVANCE.

ROSCOE F. WALTER,
Attorney for Appellants.

Press of Byron S. Adams, Washington, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 397.

WILLIAM HOLLIS ET AL., *Appellants*,

v.

CHARLES W. KUTZ ET AL., *Appellees*.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO ADVANCE.

Come now the appellants in the above-entitled cause, and respectfully move the advancement of said cause for early hearing during the October, 1920, term of this court.

The questions presented in said case, in addition to certain constitutional matters, involve various paragraphs of Section 8 of "An Act making appropriations to provide for the expenses of the government of the

District of Columbia for the year ending June 30, 1914, and for other purposes," approved March 4, 1913, (37 Stat. L. 974), known as the Public Utilities Act of The District of Columbia.

One of the principal issues raised is that wherein appellants challenge the power of the Public Utilities Commission to fix rates for gas furnished private consumers in the District of Columbia by the appellee, the Washington Gas Light Company, without regard to the prices paid to said Company for gas used by the United States and District Governments and others in the District not "private consumers" within the meaning of that term as used in the orders of said Utilities Commission made the basis of appellants' bill in equity herein involved.

Appellants insist that the provisions of the Utilities Act giving the Commission the power to regulate and fix reasonable and non-discriminatory rates to be charged by the various utilities in the District for their products, services, etc., do not authorize it to increase or modify rates to private consumers or individuals receiving such products, services, etc., and at the same time not regulate and fix corresponding rates and charges for similar products and services furnished to others not private consumers or receivers of such products or services. In other words, the Act requires that price regulation shall extend to all consumers of gas in the District of Columbia.

As alleged in the bill, the two orders complained of were made pursuant to applications of the Gas Company for increased rates, the basis of the petitions being that the increases sought were necessary if the company were to receive a reasonable return on its investment.

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These orders were promulgated on March 15, 1918, and March 15, 1919, respectively, and prescribed increased rates on gas furnished to private consumers only, to wit: from the statutory rate of 75 cents per 1,000 cubic feet, to 90 cents, and therefrom to 95 cents per 1,000 cubic feet, the rate to the governments for gas used in public buildings being permitted to remain at the statutory rate of 70 cents, and that for gas used by the governments for certain other purposes and for that furnished to other companies not private consumers being permitted to remain at an average of about 52 cents per 1,000 cubic feet, and when it appeared at the hearings on the applications for the higher rates that the cost of producing gas at the burners was in excess of the government rate of 70 cents.

Owing to the increased cost of everything essential to the manufacture and delivery of gas to the user since the promulgation of the orders complained of in appellants' bill, additional applications at various times have been made to the Commission by the appellee gas company, resulting in further advances in the rates to private consumers until at the present time the rate is in excess of $1.30 per 1,000 cubic feet, with a graduated scale of somewhat lower rates to wholesale private consumers. During all this time the government rate and that to companies not private consumers have been permitted to remain at that, or practically that, stated in the last preceding paragraph.

The result, therefore, is that appellants and all other private consumers of gas in the District of Columbia have been and now are being forced to pay by reason of said orders, unreasonable, unjustly discriminatory, and confiscatory rates for gas used by them, and there-

by forced to contribute material amounts of money toward the payment of the gas bills of the General and District Governments and of certain companies not private consumers, a burden from which, it is respectfully submitted, appellants and all other private consumers in the District should be immediately relieved as well as reimbursed for moneys which they have paid in excess of the legal rate.

Another question of importance, and arising out of the Utilities Act, is that made the basis of affirmance by the Court of Appeals of the dismissal of appellants' bill. The action of the trial court was based on its conclusion that the complaint did not state a cause of action and that plaintiffs' right of action was barred by the statute of limitations contained in paragraph 65 of the Utilities Act. The latter court overruled the motion to dismiss the bill on the ground contended for by defendants (appellees here), namely: that plaintiffs were not properly before the court and not "parties interested" within the meaning of paragraph 64 of the Act. The Court of Appeals, however, disagreed with this conclusion of the trial court and based its affirmance of dismissal solely on that ground, holding that plaintiffs' bill was in the nature of an appeal, that they first should have made complaint to the Utilities Commission; and that until they did so, they could not become "parties interested" within the meaning of the Act, such as to entitle them to institute a proceeding in equity in the Supreme Court of the District.

The decision of the trial court that plaintiffs' right of action is barred by paragraph 65 of the Utilities Act also presents a question of importance which should be decided at the earliest convenient date. This limita-

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tion prescribes a period of 120 days after the rendition of an order of the Commission within which an application to the Supreme Court of the District to set aside such order, shall be made. Appellants contend that this provision does not relate to an action such as the one here involved for the reason that the alleged illegality of the orders complained of is based on a disregard by the Commission of appellants' rights arising under the constitution and under paragraph 93 of the Utilities Act itself, which declares that—

> This Section shall not have the effect to release or waive any right of action * * * by any person for any right which may have arisen or which may hereafter arise under any law of the United States or any regulation in force in the District of Columbia.

Aside from this, should the statute of limitations be held to apply to the order of March 15, 1918, (the order of March 15, 1919, not being affected because attacked by plaintiffs' bill within the 120 days) the limitation would be void because it would affect a denial of a constitutional right, namely, that of appeal to the courts for relief and protection against unconstitutional orders and rates illegal in and of themselves.

Another question of importance is that which arises by reason of the alleged failure of the Commission to give proper and reasonable notice to certain parties interested, of the time of an adjourned hearing on the 2nd application of the appellee gas company for increased rates resulting in the order of March 15, 1919, made a basis of appellants' bill, in violation of paragraph 94 of the Utilities Act.

It is therefore respectfully submitted that the case presents questions of public importance and should be decided at the earliest moment convenient to this honorable court.

Congress has recognized the importance of an early determination of questions arising under the Utilities Act by its having provided in the 3rd paragraph of paragraph 64 of the Act as follows:

> All such proceedings (as that here involved) shall have precedence over any civil cause of a different nature pending in such court, and the Supreme Court of the District of Columbia shall always be deemed open for the trial thereof, and the same shall be tried and determined as are equity proceedings in said court.

It is therefore submitted that this motion should be allowed, and the suggestion is respectfully made, in case it is allowed, that January 15th, next, be the date fixed upon which the case may be heard.

Copies of the motion have been served on counsel for the appellees.

Respectfully,

ROSCOE F. WALTER,

Attorney for Appellants.

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Supreme Court, U.S.
FILED
OCT 13 1920
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM.

No. 397.

WILLIAM HOLLIS and SAM GOODMAN, *Appellants*,

vs.

CHARLES W. KUTZ, Chairman; LOUIS BROWNLOW and W. GWYNN GARDINER, Commissioners of the District of Columbia, and as Such Constituting the Public Utilities Commission of the District of Columbia, and the WASHINGTON GAS LIGHT COMPANY, *Appellees*.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS.

ROSCOE F. WALTER,
Attorney for Appellants.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

This appeal seeks a reversal of the judgment of the Court of Appeals of the District of Columbia which

affirmed a decree of the Supreme Court of the District dismissing appellant's bill in equity seeking to set aside certain orders of the Public Utilities Commission of the District fixing charges for gas furnished to private consumers by the appellee, the Washington Gas Light Company, also seeking refund of amounts paid by appellants for gas used by them pursuant to such orders above the rate alleged by them to be the legal rate.

On May 15, 1919, appellants filed their bill in the Supreme Court of the District of Columbia against appellees, seeking to have set aside two orders of the Public Utilities Commission of March 15, 1918, and March 15, 1919, respectively, the first of which in Formal Case No. 13, order P. U. C. No. 254, advanced the rate to be charged private consumers of gas in the District, from the statutory rate of 75 cents per thousand cubic feet, to 90 cents, and the second, in Formal Case No. 70, order P. U. C. No. 314, which again increased the rate to 95 cents per thousand cubic feet. The bill also asked a refund to appellants of amounts paid by them above the statutory rate with interest from dates of payment, on all gas used by them since the effective date of such orders. The bill also prayed that the appellee Commissioners be required to cause to be made certified transcripts of all proceedings had and the testimony taken in connection with the investigations resulting in the orders complained of, in accordance with paragraph 52 of [redacted] the Public Utilities Act of March 4, 1913 (37 Stats. L., 974), and that appellants have such other and further relief as the nature of the case may require and to the Court may seem meet and proper.

The bill alleged that the legal rate to private consumers of gas in the District of Columbia in effect subsequent to October 1, 1916, and at the times complained of, was that fixed by Section 6 of the Act of Congress of September 1, 1916 (39 Stats. L., 676), namely 75 cents per thousand cubic feet; that the aforesaid order No. 254, of March 15, 1918, advancing the rate to 90 cents, was illegal, discriminatory, unconstitutional and null and void *ab initio*, because not made in accordance with the requirements of [redacted] the Public Utilities Act in that:

(a) Said order attempted to increase the rate to private consumers only and without regard to that charged the United States Government, the District of Columbia, and other consumers of gas in the District not included in the designation "private consumers," the rate to the Governments being permitted to remain at that fixed by the aforesaid Act of September 1, 1916, to-wit: 70 cents per thousand cubic feet.

(b) The provisions of said Utilities Act giving the Utilities Commission the power to regulate and fix reasonable and non-discriminatory rates to be charged by the utilities for their products, services, etc., in the District of Columbia, do not authorize said Commission to increase the rate to private consumers or individuals receiving such product, service, etc., and at the same time not regulate and fix the price to be charged the United States, the District of Columbia, and others not private consumers; but such provisions require that price regulations shall extend to all consumers receiving any product or service at the hand of any public utility in the District,

And unconstitutional in and of itself because

(c) Said order attempted to increase the rate to private consumers of gas in order that the appellee, the Washington Gas Light Company, might receive a reasonable income on the valuation of its properties, sustain its credit, and conduct its business at a reasonable profit on its investment, it appearing, as stated by counsel for said company at the hearing before the Utilities Commission, that the cost of producing gas at the burner amounted to 79½ cents per thousand cubic feet, as estimated for the year 1918, said order thus effecting a discrimination against appellants and depriving them of their property without due process of law by thus requiring them to contribute toward making up the losses which otherwise would have accrued to the Gas Company by reason of its furnishing its product to the Governments and others not private consumers, at a rate below cost of production, and even below the Government statutory rate of 70 cents.

As to the Second order, No. 314, of March 15, 1919, further advancing the rate to private consumers, from 90 to 95 cents per thousand cubic feet, the bill alleged such action of the Utilities Commission to be illegal, unduly discriminatory, confiscatory, unconstitutional and null and void, *ab initio,* for the reasons above stated as to order No. 254 and for the further reason, as appeared at the hearing before the Utilities Commission, that if the private consumer of gas had paid 90 cents per thousand cubic feet for the entire year of 1918, and had the Governments paid the same rate during such period, the Gas Company would have made expenses and received a return of approximately

6 per cent on its investment. It also appeared as alleged in the bill as follows:

(1) The total sales for the first nine months of the year 1918, in the District of Columbia, for United States buildings, municipal purposes, park lamps and street lamps, amounted to 187,844,000 cubic feet, the average price for which was 52.15 cents per thousand.

(2) The total sales to other companies in theDistrict amounted to 168,592,000 cubic feet, the average price for which was 51.32 cents per thousand.

(3) The total sales in the District for said period, including those to private consumers, amounted to 2,908,701,000 cubic feet.

Also, as to the second order the bill alleged the same to be illegal *ab initio* for the further reason that it was not made in accordance with the requirements of paragraph 94 of the Utilities Act of March 4, 1913, aforesaid, in that in the conduct of the investigation resulting in the order complained of, the statutory notice to one of the parties who had entered an appearance therein, was not given, thus depriving him and the persons he represented of an opportunity to be heard.

Paragraph 3 of the bill as originally filed, alleged that suit was brought under and by virtue of paragraph 64 [redacted] of the Utilities Act. On July 8, 1919, leave of the court first having been obtained, the bill was amended by substituting in lieu of the original paragraph 3 of the bill the following allegation of jurisdiction:

> (3) That said plaintiffs, William Hollis and Sam Goodman, institute this their bill in equity both because they are without adequate remedy at law, and because paragraph 64 of Section 8 of

said Act of March 4, 1913, creating the Public Utilities Commission of the District of Columbia, expressly provides that any person interested and being dissatisfied with any order or decision of said Commission fixing any rate or rates, tolls or charges, may commence a proceeding in equity in this honourable court against the said Commission to vacate or set aside any such decision or order, on the ground that such rate or rates, tolls or charges complained of fixed in such order is unlawful or unreasonable.

On May 29, 1919, the Utilities Commission moved to dismiss appellants' original bill on the following grounds:

(1) That the plaintiffs have not by said bill set forth facts upon which they are entitled to the relief prayed therein.

(2) That the plaintiffs were not parties to the proceedings before the Public Utilities Commission set forth in said bill either formally or by reason of any complaint filed by them before said Commission in said proceeding and are not interested parties within the meaning of paragraph 64 of the Public Utilities Law of the District of Columbia and as such entitled to institute an action to vacate, set aside or modify the orders passed by it as set forth in the bill of complaint.

On June 3, 1919, the appellee, The Washington Gas Light Company, moved to dismiss the original bill on the two grounds above stated and on the three following additional grounds, to-wit:

(3.) That the plaintiff's bill was not filed within one hundred and twenty days after the entry or rendition of the order or determination of March

15, 1918, in Formal Case No. 13, as required by paragraph 65, Section 8, of the Act of Congress, approved March 4, 1913, known as "Public Utilities Act," which gives the right of appeal from the order or determination of the Public Utilities Commission for a period only of one hundred and twenty days after such entry or rendition thereof.

4. That the plaintiffs have not exhausted that remedy before the Public Utilities Commission.

5. That the bill is multifarious.

On July 8, 1919, the defendants moved to dismiss the bill *as amended*, on the same ground, above set out, and the court after hearing argument and considering briefs, on the same day sustained defendants' motion, ruling as follows:

1. I think the first ground is well taken.

2. I think the plaintiff's are entitled to bring suit under paragraph 64 of the Act.

3. I think the 3rd ground is well taken.

4. I do not think the 4th ground is well taken.

5. I do not think the 5th ground is well taken.

From the action of the Supreme Court of the District in dismissing the plaintiffs bill they appealed to the Court of Appeals of the District, making the following assignments of error:

1st. The Court erred in holding that the plaintiffs have not in their amended bill of complaint set forth facts entitling them to the relief prayed for.

2nd. The Court erred in holding that the plaintiffs' right of action sought to be enforced in their amended bill is barred by the statute of limitations as provided in paragraph 65 of Section 8 of the Act of Congress of March 4, 1913, known as the "Public Utilities Act."

3rd. The Court erred in sustaining the motion of the defendants, filed July 8, 1919, to dismiss plaintiffs' amended bill.

On April 5, 1920, the Court of Appeals of the District affirmed the judgment of the Supreme Court, with costs, holding that the appellants are not "persons interested" within the meaning of that term as used in paragraph 64 of the Public Utilities Act, and that the equitable proceeding contemplated by said paragraph is in the nature of an appeal rather than an original suit.

To the action of the Court of Appeals in affirming the decree of dismissal, the following assignments of error are represented to this Court, Rec., p. 34.

ASSIGNMENTS OF ERROR.

(a) In affirming the decree of the Supreme Court of the District of Columbia, which dismissed the plaintiffs' amended bill of complaint.

(b) In finding that the appellants, plaintiffs in the Supreme Court of the District of Columbia, are not persons interested within the meaning of that term as used in paragraph 2 of paragraph 64 of the Public Utilities Law, Section 8 of the Act Making Appropriations to provide for the Expenses of the Government of the District of Columbia for the Fiscal Year Ending June 30, 1914, and for Other Purposes, approved March 4, 1913.

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(c) In finding that the equitable proceeding in the Supreme Court of the District of Columbia contemplated by paragraph 64 of Section 8 of said Act of March 4, 1913, is in the nature of an appeal rather than an original suit.

(d) In affirming the decree of the Supreme Court of the District of Columbia, and which denied to the appellants the relief sought by their amended bill of complaint.

ARGUMENT.

The decision of the Court of Appeals appears in the record, pages 28-30. It will be seen from a consideration of this opinion that the affirmance of the decree of the Supreme Court of the District dismissing appellants' bill is based on grounds which the latter court held not to be tenable. In other words, the Supreme Court found that appellants are interested parties within the meaning of paragraph 64 of the Utilities Act and as such were entitled to bring suit to set aside the orders complained of.

The Court of Appeals holds that before appellants had a right to file suit in the Supreme Court it was first necessary for them to have gone before the Utilities Commission and engage in the proceeding of again presenting to that body the very matters that it had already considered when the applications for increased rates were made by the appellee gas company in formal cases numbers 13 and 70. In this holding it is respectfully submitted the Court of Appeals erred.

That Court in setting out in its opinion the various provisions of the act under which proceedings before the Utilities Commission may be instituted failed to include the following provisions, namely:

Par. 40: That any public utility may make complaint as to any matter affecting its own product or service with like effect as though made by the commission or upon reasonable complaint as hereinbefore provided.

Par. 94. * * * third, any public utility desiring to advance or discontinue any such rate or rates may make application to the commission in writing, stating the advance in or discontinuance of the rate or rates desired, giving the reasons for such advance or discontinuance; fourth, upon receiving such application the commission shall fix a time and place for hearing, and give such notice to interested parties as shall be proper and reasonable; if after such hearing and investigation, the commission shall find that the change or discontinuance applied for is reasonable, fair, and just, it shall grant the application, either in whole or in part; fifth, any public utility being dissatisfied with any order of the Commission made under the provisions of this paragraph may commence a proceeding against it in the Supreme Court of the District of Columbia *in the manner as in this section hereinbefore provided, which action shall be tried and determined in the same manner as is in this section hereinbefore provided.* (Italics ours.)

The italicized words refer to the provisions of Par. 64 of the Utilities Act quoted in the opinion of the Court of Appeals, which are as follows:

That any public utility and any person or corporation interested being dissatisfied with any order or decision of the commission fixing any valuation, rate or rates, tolls, charges, schedules, joint rate or rates or regulations, requirement, act, service or other thing complained of may commence a proceeding in equity in the Supreme

> Court of the District of Columbia against the commission, as defendants, to vacate, set aside, or modify any such decision or order on the ground that the valuation, rates, tolls, charges, schedules, joint rate or rates, or regulation, requirement, act, service, or other thing complained of fixed in such order is unlawful, inadequate or or unreasonable.

It was in pursuance of the above provisions, paragraphs 40 and 94 of the Utilities Act, and which paragraphs, as above noted, were not quoted in the opinion of the Court of Appeals, that the appellee gas company made its applications in formal cases 13 and 70, for the increased rates sought, and which resulted in orders P. U. C. 254 and 314, made the bases of appellants' complaint. In the face of this fact the Court of Appeals affirmed the dismissal of the bill because, as it said:

> In any event, however, formal complaint must be filed, hearing had, and a final order obtained from the Commission, before the jurisdiction of the courts can be invoked.

Appellants' bill alleged these very prerequisite conditions. The demands of the statute in this respect were met in the filing with the Utilities Commission by the gas company, of the two applications for increased rates and by the subsequent hearings, findings, and orders in the respective formal cases numbers 13 and 70. Then, as provided in Par. 64 of the Act, appellants, being interested parties and dissatisfied with said orders of the Commission, made pursuant to the applications of the gas company, filed their bill in the instant case, seeking to have such or-

ders vacated and set aside on the grounds that they were not made in accordance with the requirements of the Act creating the Commission, and that the facts alleged, on their face, show the orders to be illegal, discriminatory, and confiscatory as against the appellants.

The conclusion of the Court of Appeals that before resort can be had to the courts the same matters must again be presented to the Utilities Commission, can not be upheld. Particularly is this true for the additional reason that the questions presented are justiciable. They are purely questions of law. They are questions for the consideration of a court of competent jurisdiction, which in the instant case, by reason of the specific provisions of the Utilities Act itself, is the Supreme Court of the District of Columbia.

The powers and duties of the Utilities Commission are analogous to those of the Interstate Commerce Commission, and any order of either administrative body which is made in disregard of the requirements of the law or which deprives any person or corporation of rights or property guaranteed under the Constitution is reviewable by the courts.

As was said by this Court in *Int. Com Com.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 92:

> Whether the order deprives the carrier of a constitutional or statutory right; whether the hearing was adequate and fair, or whether, for any reason, the order is contrary to law—are all matters within the scope of judicial power.

Therefore, where an administrative body such as the Utilities Commission or the Interstate Commerce Commission, exceeds its statutory power, an order

made pursuant to such action may be enjoined by a court of competent jurisdiction, even though the plaintiff has not attempted to secure redress in a proceeding before the Commission. *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, 562, citing *Int. Com. Com.* v. *Diffenbaugh,* 222 U. S. 42, 49; *Louisiana & Pacific Ry. Co.* v. *United States,* 209 Fed. 244, 251; *Atlantic Coast Line R. R. Co.* v. *Int. Com. Com.,* 194 Fed. 449, 451.

The case of *F. H. Peavey & Co.* v. *Union Pacific R. Co.,* 176 Fed. 409, is conclusive against the appellees and the judgment of the Court of Appeals in the case at bar. In that case there was a demurrer to the bill of a certain Diffenbaugh and his associates on the ground that they as complainants were not parties to the proceedings before the Interstate Commerce Commission, upon which the order of that Commission was based. The Circuit Court of the United States for the Western District of Missouri, speaking through Sanborn, C. J., said, p. 417:

> A careful search of the interstate commerce act discloses no limitation of the parties who may maintain suits to enjoin, set aside, annul, or suspend an order of the Commission to those who were parties to the proceeding before it upon which the order was based. *The proceeding in the court is not an appeal;* it is a plenary suit in equity. The jurisdiction to hear and determine such suits is vested in the Circuit Courts. Section 16, as amended (34 Stat. 592, U. S. Comp. St. Supp. 1909, p. 1162). The determination of the question what parties may maintain such suits is left by the interstate commerce act to the general rules and practice in equity, and under them any party whose rights of property are in danger

> of irreparable injury from an unauthorized order of the commission may appeal to a federal court of equity for relief. * * * The complainants in the Diffenbaugh case are entitled to challenge the order of the Commission in this court. The allegations in their bill that this order was beyond the power of the Commission and will irreparably injure their property and their business present good ground for equitable relief, and the demurrer of the Commission must be overruled.

This court, in affirming the decision of the Circuit Court on the question of jurisdiction in the case from which the above conclusion is quoted, in *Int. Com. Com.* v. *Diffenbaugh,* 222 U. S. 42, 49, said:

> The jurisdiction in the Diffenbaugh case was doubted, although the Commission did not press the point, as it wishes a final decision. We are content to leave that matter on the statement of the court below, 176 Fed. 416, 417. The plaintiffs are affected by the order and it is just that they should have a chance to be heard although not parties before the Commission.

Paragraph 64 of the Utilities Act provides that *any person interested* and dissatisfied with *any order may commence* a proceeding in equity in the Supreme Court of the District.

The appellants were such parties. As said in the *Diffenbaugh case,* their proceeding is not an appeal. As decided by the Supreme Court of the District (the dismissal of the bill by that Court being on other grounds), "The plaintiffs are entitled to bring suit under paragraph 64 of the Public Utilities Act." They are interested parties, as is shown by the facts alleged in their bill. In *Fitch* v. *Board of Sup'rs.,* 54

Pac. 901, the term "party interested" was defined as follows:

> The "party interested, who is thus authorized to invoke peremptory power to compel the board to pass an ordinance fixing the water rates, is a party who has an interest in having the rates fixed, and who would be injuriously affected if they were not fixed.

It is therefore submitted that since the orders complained of were made pursuant to applications of the gas company to the Commission for increased rates; that appellants' bill is based on the illegality of such orders arising by reason of the Commission's action in the matter being not in accordance with the requirements of the Utilities Act; that the facts alleged show the orders to be illegal, unduly discriminatory and confiscatory; that the relief sought is of a nature such as can be obtained only from a court of equity; that the Utilities Act itself provides that any person interested being dissatisfied with any order of the Commission may commence a proceeding in equity in the Supreme Court of the District; and that the appellants' amended bill was filed pursuant to the last stated provision, and on the further ground that they were without an adequate remedy at law, such bill, it is respectfully submitted, was properly filed in the Supreme Court of the District, and that such body was the only forum which could assume jurisdiction of the matter complained of.

It therefore follows that the Supreme Court of the District had jurisdiction and that the Court of Appeals erred in affirming the decree of dismissal on the ground made the basis of the latter court's conclusion.

The orders involved, Nos. 254 and 314, Increasing the Rates to be Charged Private Consumers, from the Statutory Rate of 75 cents to 90 cents, and Therefrom to 95 cents per 1,000 cubic feet of Gas, are Invalid, Because not Made in Accordance with the Requirements of the Public Utilities Act, and Because the Rates Fixed by Such Orders Are Unreasonable, Discriminatory and Confiscatory, as Alleged in the Bill.

No written opinion stating the reasons sustaining the motion to dismiss was filed by the trial court. Although not appearing in the record, his Honor remarked, when the motion was allowed, that he did not believe that the Public Utilities Commission possessed the power to fix a rate to the United States and District Governments for gas furnished them in the District of Columbia.

Appellants' contention is that the Utilities Commission has such power, and that in the exercise of its function as a rate making body, circumscribed by the statutory restrictions that all rates shall be reasonable, just and non-discriminatory, it shall prescribe such a rate not only to the private consumer, but to all consumers of gas in the District of Columbia.

To hold that the Act does not give the Commission such power is to put such a construction on the law as will defeat one of the chief purposes of its enactment.

In the determination of reasonable and non-discriminatory rates, such rates must be arrived at with regard being had to those charged all consumers of the product in the District. Paragraph 2 of the Act renders unlawful the charge by any public utility of a discriminatory rate. Paragraphs 38 to 42, 44, 45 and 88, give to the Commission the power to investigate

and relieve against any unjust discrimination. It is respectfully submitted that Congress, when it conferred upon the Commission this power, contemplated that it should exercise it completely and without being hampered with the condition that a rate to some of the consumers would be fixed at a certain inflexible figure, as appellees contend in this case, and at a price far below the cost of production. Especially is this true when the consumers having the benefit of such low rate are very material users of the product, and so much so that, as alleged in the bill, had the Governments during the year 1919 paid the private consumers' rate of 90 cents, the Gas Company would have earned above all costs of operation, 6 per cent on its investment. And, of course, it follows that any increase in the amount of gas furnished to the Governments at a fixed rate below the cost of production, adds to the burden of the private consumers if the rate to the latter must be made sufficiently high that it will guarantee to the producer a reasonable income on its investment.

The requirements of the Utilities Act with respect to rates and charges for products and service furnished by the various utilities subject to the Act are as follows:

> Par. 2. * * * The charge made by any such public utility for any facility or services furnished, rendered, or to be furnished or rendered, shall be reasonable, just and non-discriminatory. Every unjust or unreasonable or discriminatory charge for such facility or service is prohibited and is hereby declared unlawful. Every public utility is hereby required to obey the lawful orders of the commission created by this section.

Par. 24. That every public utility shall file with the commission, within a time fixed by the commission, schedules, which shall be open to public inspection, showing all rates, tolls, and charges which it has established and which are in force at the time for any service performed by it in the District of Columbia, or for any service in connection therewith or performed by any public utility controlled or operated by it. The rates, tolls, and charges shown on such schedules shall not exceed the rates, tolls, and charges now allowed by law, and shall be the lawful rates, tolls, and charges within the District of Columbia, and shall remain and be in force until set aside by the commission.

Par. 30. That it shall be unlawful for any public utility to charge, demand, collect, or receive a greater or less compensation for any service performed by it within the District of Columbia, or for any service in connection therewith, than is specified in such printed schedules * * * as may at the time be in force, or to demand, collect, or receive any rate, toll, or charge not specified in such schedules. The rates, tolls, and charges named therein shall be the lawful rates, tolls, and charges until the same are changed as provided in this section.

Par. 81. That if any public utility or any agent or officer thereof shall, directly or indirectly, by any device whatsoever, or otherwise, charge, demand, collect, or receive from any person, firm, or corporation a greater or less compensation for any service rendered or to be rendered by it in or affecting or relating to the conduct of a * * * gas plant, gas corporation, * * * or for any service in connection therewith than that prescribed in the public schedules or tariffs then in force or established as provided herein, or than

it charges, demands, collects, or receives from any other person, firm, or corporation other than one conducting a like business for a like and contemporaneous service, such public utility shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be a misdemeanor and unlawful, etc.

Par. 88. That whenever, after hearing and investigation as provided in this section, the commission shall find that any rate, toll, charge, regulation, or practice of any public utility within the District of Columbia is unreasonable or discriminatory, it shall have the power to regulate, fix, and determine the same as provided in this section.

That the power of the Commission to relieve against all unreasonable or discriminatory rates is complete can not be doubted in view of the above provisions, and those of paragraph 41 of the Act, which are as follows:

Par. 41. That if upon such investigation the rates, tolls, charges, schedules, or joint rates shall be found to be unjust, unreasonable, insufficient, or unjustly discriminatory, or to be preferential or otherwise in violation of any of the provisions of this section, the Commission shall have power to determine and by order fix and order to be substituted therefor such rates or rates, tolls, charges, or schedules as shall be just and reasonable. If upon such investigation it shall be found that any regulation, time schedule, act or service complained of is unjust, unreasonable, insufficient, preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of this section, or if it be found that reasonable service is not supplied, the Commission shall have power to

> determine and substitute therefor such other regulations, time schedules, service or acts and to make such orders respecting and such changes in such regulations, time schedules, service or acts, as shall be just and reasonable.

In the case of *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, 355, 356, this court in construing Section 3 of the Act to Regulate Commerce, and in holding that the power of the Interstate Commerce Commission in the matter of removing discriminations extends to a regulation of an intrastate rate, under an authority no broader in scope, we submit, than that given the Utilities Commission in the paragraph of the Act last quoted, said:

> Section 3 of the Act to Regulate Commerce provides (February 4, 1887, c. 104, 24 Stat. 379, 380):
>
> "Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, or corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or advantage in any respect whatsoever."
>
> This language is certainly sweeping enough to embrace all of the discriminations of the sort described which it was within the power of Congress to condemn. There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to interstate rates as maintained by the carrier. It is apparent from the legislative history of the Act that the evil of discrimination was the principal thing aimed at, and there is no

basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach.

It clearly appears from the wording and from the intent of the various paragraphs of the Utilities Act that Congress contemplated that the Utilities Commission, after being fully advised as to all matters and circumstances affecting rates to be charged by the various utilities in the District, should have, and thereby would have the power to fix reasonable and non-discriminatory rates, and when occasion should arise for the determination of such rates, whether on the initiation of the Commission itself, on complaint of a patron of one of the utilities, or on application of the utility, the duty is incumbent on the Commission to find, and require by its order a reasonable and non-discriminatory rate or rates to be charged *all* parties receiving the product or service from any such utility.

There is no provision of the Act which by wording or implication restricts the fixing of rates by the Commission on products or service furnished to private consumers only. To thus restrict the power of the Commission would necessitate reading into the statute an exception in violation of one of the well recognized rules of construction of this court. *Employers' Liability Cases,* 207 U. S. 463, 500. Not only would such a construction require reading something into the law, but in addition to disregarding the rule that all rates fixed by the Commission shall be non-discriminatory, it would also necessitate a disregard of the plain requirements of paragraph 24 of the Utilities Act, which provides that the utilities shall file with the Commission schedules of *all* rates for *any* service and which

rates shall be the lawful rates until set aside by the Commission; of paragraph 30, which provides that it shall be unlawful for any utility to charge a greater rate for *any* service in the District than that specified in such schedules, such rates being the legal rates until changed as provided in the Act; of paragraph 81, which provides that any public utility or officers thereof charging or collecting from *any* person, firm or corporation a greater or less compensation for *any* service than prescribed in such schedules or than it charges or collects from *any* other person, firm or corporation, except those engaged in like business, shall be deemed guilty of unlawful discrimination and subject to the penalties therein provided; of paragraphs 38 to 41 inclusive, which provide that on its own initiation or complaint of any utility that *any* rate is unreasonable or unjustly discriminatory, the Commission may after hearing fix and determine reasonable and non-discriminatory rates; of paragraphs 44 to 46, inclusive, which provide that whenever the Commission believes *any* rate may be unreasonable or unjustly discriminatory it may summarily investigate and fix reasonable and non-discriminatory rates; of paragraph 88 which provides that whenever after an investigation it finds *any* rate or charge to be unreasonable or discriminatory the Commission may regulate and fix the same; and of paragraph 94, which provides that unless the Commission shall otherwise order it shall be unlawful for any utility to charge a greater compensation for *any* service in the District than that fixed on the lowest scheduled rate in effect on the date of the passage of the Act and that every utility within 30 days therefrom shall file with the Commission copies of *all* schedules of rates in force

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on that date and that any utility desiring to change *any* such rate shall apply therefor to the Commission for relief. As to the inclusiveness of these provisions by reason of the use of the words "any" and "all," attention is called to the case of *Louisville & Nashville Railroad* v. *Mottley*, 219 U. S. 467, 479.

That the appellee gas company recognized that these provisions contemplated their filing [redacted] of rates charged for gas furnished the Governments is evidenced by the fact that such schedules were filed in accordance with the requirements of the Act.

Until Recently the Gas Company, Through Its Counsel, Contended for the Proposition Herein Urged by Appellants, Namely, That the Commission Possesses the Power and has Imposed Upon it the Duty to Fix Rates to Be Charged the General and District Governments.

In the Act of September 1, 1916, which fixed the 70-cent rate to the Governments and the 75-cent rate to private consumers, it is provided as follows:

> Sec. 6. That hereafter no part of any money appropriated by this or any other Act shall be used for the payment to the Washington Gas Light Company or the Georgetown Gas Light Company for any gas furnished by said companies for use in any of the public buildings of the United States or the District of Columbia at a rate in excess of 70 cents per thousand cubic feet.
>
> On and after the first day of October, nineteen hundred and sixteen, the Washington Gas Light Company shall not charge or collect for gas furnished a private consumer in any part of the District of Columbia a rate in excess of 75 cents per thousand cubic feet of gas so furnished: *Provided*, that if a consumer of gas other than the

> Government or the District of Columbia shall not pay monthly any gas bill within ten days after the same shall have been presented, said gas company may charge and collect from any such consumer so failing to pay said gas bill as aforesaid 10 cents additional for each one thousand cubic feet of gas represented by said bill: *And provided* further, that nothing herein contained shall be construed as limiting or taking away any of the powers now vested by law in the Public Utilities Commission of the District of Columbia.
>
> That from and after October first, nineteen hundred and sixteen, the Georgetown Gas Light Company shall not be permitted to charge or collect more than 85 cents per thousand cubic feet for gas for cooking, illuminating or other purposes.

The history of the legislation resulting in the Act of Congress just quoted shows that Section 6 as proposed originally consisted only of the first paragraph of the law as above set out, and contained no provision for the Utilities Commission still retaining the powers granted under the Utilities Act of 1913. The bill as thus presented, was opposed by the appellee gas company through its counsel, Mr. Darlington, for the reasons appearing on page 336 of the Hearings Before the Subcommittee of the Committe on Appropriations, United States Senate, June 23, 1916, incorporated into the proceedings of the Senate, as in Committee of the Whole, beginning page 11943, Cong. Rec., of Aug. 2, 1916, as follows:

> Mr. Darlington's statement: Mr. Chairman, on behalf of the Washington Gas Light Company, we would like to submit some considerations in respect to Section 6 of the Act.

That provides that no part of any money appropriated by this or any act shall be used for payment to the Washington Gas Light Company for any gas furnished by them for the use of the public buildings of the United States or the District of Columbia at a rate in excess of 70 cents per thousand cubic feet.

We have three objections to that section: *The first is that the Public Utilities Act reposes in that Commission the power and duty of fixing uniform rates, and we would think it ought to be left to that Commission to do that.*

Also at the hearing before the Commission in formal case No. 13, on December 18, 1917, pp. 34 and 35 of the record, in reply to questions of Corporation Counsel, Mr. Syme, as follows:

Mr. Syme: May I ask you one question, Mr. Darlington? The Act of Congress which Commissioner Gardiner has read, fixes the price of gas for private consumers, I think in Washington, at 75 cents and the price of gas to the District of Columbia and to the United States Government at 70 cents. Do you think it is in the power of the Public Utilities Commission to fix the price of gas for the Government and for the District of Columbia?

Mr. Darlington: May I answer that by another question?

Mr. Syme: Yes.

Mr. Darlington: Does the Corporation Counsel consider that it was in the province of the Public Utilities Commission to fix the price of Government gas before this 75-cent price was established?

Mr. Syme: I am not in position to answer that.

Mr. Darlington: If you had it before, you have it now; if you had not, you have not now.

Mr. Syme: Do you think we had the right to interfere with the price of the service of any public utility to the Government or the District of Columbia, or do you think it was simply to determine whether or not the private consumers were being served at a reasonable rate?

Mr. Darlington: I am free to say that the power of the Commission to fix the price the Government shall pay is one I have not considered.

Further it was developed at the same hearing that *the petition for a rate increase was filed on the theory that relief was expected from the Commission by its increasing the rate both to the Governments and to the private consumers,* as appears from pages 36 and 37 of the record of the same hearing on December 18, 1917, which is as follows:

Mr. Syme: I want to ask Mr. Minor if in the calculation of $1.10 (the price sought to have the Commission establish) and the return from it you calculate upon the gross amount of gas you are furnishing both to the Government and to the private consumer?

Mr. Minor: Yes.

Mr. Syme: And did you calculate then that we would have to increase the price both to the Government and the District?

Mr. Darlington: *Of course, the answer is "yes."* If you find the increase is necessary and you can not charge the Government at the increased rate, you will have to go somewhere else. If you find it is necessary to make the increase in order to enable this utility to supply the Government with gas and find that you can not get any part of the increase from the Government, then you will have to fall back on the private consumer.

Mr. Minor: We are not likely to get this $1.10 rate out of the Government, because they have

> not appropriation enough. We think it is fair the Government should pay this with the private consumer.

Up until this time it appears from the history of the entire matter that counsel for the Gas Company took the view that the Commission possessed the power to fix Government rates and that in justice to all concerned that is what *should* be done.

But for some reason known to the appellee Gas Company, a change of attitude suddenly came upon them, for on February 16, 1918, at the argument on the first application for the increased rate, as appears from page 427 of the record for that date, Mr. Darlington took a contrary view of the legal question and expressed his view to the Commission as follows:

> Mr. Darlington: Another question suggested was whether or not this Commission had power to regulate or fix the prices paid by the Government. I was asked that question at an earlier hearing, and was not then prepared to answer. Reflection convinces me that the Commission has not that power. What the Government shall pay is fixed by its appropriation acts.

Mr. Darlington's statement that reflection convinces him that the Commission does not possess the power of fixing the Government rate is not explained, but his conclusion is clearly inconsistent with his former theory so strongly urged before the Senate Committee, that Congress should not fix a rate to the Government because the Utilities Commission is working toward that end, and his subsequent admission before the Commission that all the powers it possessed before the amendment of 1916, it still retains by reason of the

saving proviso in that Act. This action of the attorney for the Gas Company is most remindful of the statement made by Senator Norris before the Senate as in Committee of the Whole, when the question of fixing the Government rate was before it August 2, 1916, 64th Congress, third session, Cong. Rec. p. 11972, at which time the Senator from Nebraska, in referring to counsel of the Gas Company, said: "These same attorneys who are here questioning the jurisdiction of Congress will be there questioning the jurisdiction of the Public Utilities Commission."

But, aside from this, it is submitted that any imaginary ground for contending that the Commission has not the power to fix a Government rate is entirely swept away when the history of Section 6 of the Act of September 1, 1916, is given due consideration.

The History of the Legislation Resulting in Section 6 of the Act of September 1, 1916, Conclusively Shows That the Commission Possesses the Power to Fix a Government Rate.

In brief its history is as follows: That section as passed by the House and originally introduced in the Senate, as before stated, consisted only of the first paragraph of the present law, and which proposed the fixing of a 70 cent rate to the General and District Governments. When the bill (H. R. 15774) came before the Senate Committee, of which Senator Gallinger was Chairman, and of which Senator Smith of Maryland was also a member, Section 6 was stricken out, as appears from the report of that Committee, No. 669, of July 14, 1916. On August 2, 1916, the Senate, as in Committee of the Whole, took occasion

again to consider the amendment. The proceedings in relation thereto, before a vote was had on retaining the amendment, and subsequent thereto, when a substitute amendment was adopted and the rejected provision reinstated (Cong. Rec. 64th Congress, 1st Session, pp. 11971-72, 11978-80), will not be recounted in full, but references will be made to certain statements of members of the Senate Committee which conclusively show the reason why the original Section 6 standing by itself was rejected, and which throws light on the meaning of the bill as finally enacted.

In response to the following statement of Senator Norris of Nebraska:

> The Senate Committee this time, for some reason, has seen fit to strike that provision (original Section 6) out of the bill; and that is the amendment that I reserved for a separate vote. I have heard no reason why that should be done.

Mr. Dillingham of the Committee explained as follows:

> If the Senator will allow me, I will call his attention to a statement before the Committee by Mr. Darlington, I suppose counsel for the Company, a very eminent lawyer—I presume the Senator knows him—in which, on page 336 he states very clearly the reasons why it should go out.

Then ensued the following colloquy:

> Mr. Norris: Will the Senator read them? Or give the volume to me and I will read them. (Mr. Dillingham handed the volume of hearings to Mr. Norris.)
>
> Mr. President, in order that the Senate may have the benefit of it—I have not read this yet—I will read it. Mr. Darlington's statement:

Mr. Chairman, on behalf of the Washington Gas Light Company we would like to submit some considerations in respect to Section 6 of the Act.

That is one that the Senate Committee strikes out.

That provides that no part of any money appropriated by this or any other Act shall be used for payment to the Washington Gas Light Company or the Georgetown Gas Light Company for any gas furnished by them for the use of the public buildings of the United States or the District of Columbia at a rate in excess of 70 cents per thousand cubic feet.

We have three objections to that section. The first is that the Public Utilities Commission Act reposes in that Commission the power and duty of fixing uniform rates, and we would think it ought to be left to that Commission to do that.

* * * The representatives of this Company appear before the Committee and object to this rate because they say that the Public Utilities Commission has jurisdiction. * * *

Now, take the next objection, and I am taking them up without having read them before. I have not read this one yet.

In the second place, the same public utilities act in paragraph 81 makes it a misdemeanor for the officers of these companies to furnish any person, firm or corporation gas at a greater or less compensation than others. So it creates a question whether this would not lower the rate to everybody to 70 cents per thousand cubic feet.

Now let us take the third objection:

In the third place, this identical provision, or one to the same effect, was passed by the House in connection with the legislative bill, was con-

sidered by the Senate Committee, and the Commissioners were interrogated about it. I read from page 10 of the hearing on the legislative bill.

"Senator Overman: How are you getting on with the gas company? Have you reached a conclusion?"

"Commissioner Kutz: No, sir, but we expect to reach a finding as to valuation within three months, and by the first of July we anticipate that we will be able to present the valuation of our experts to the companies for a hearing to determine the 'fair value' of the property of the companies."

"Senator Smoot: Let me ask you if this provision in the House bill"—*that is the one fixing it at 70 cents for public buildings*—"in any way conflicts with the public utilities law passed by Congress? Does it conflict with paragraphs 81 and 38 and 41?"

Those are the ones that make it a misdemeanor to make any discrimination to any person in the price of gas.

"Commissioner Kutz: *In a sense it does, in that it apparently takes away from the utilities commission a power that Congress has lodged in that Commission; and I feel that the Commission's hands would be tied with respect to that kind of service if, subsequent to the passage of the law, Congress fixed a price for a particular use.*"

* * * * *

"Senator Overman: Your idea is that it would be better to wait and let the Public Utilities Commission fix it?"

"Commissioner Kutz: *Yes, sir; that it would be much better to wait.*"

Without reading further, the Senate Committee

sustained that view, the provision was stricken out of the House bill and the conferees acceded to it. This is a proposition to reintroduce it, not only as to the District, but in other acts in which it has been expressly excluded. On these three grounds we think this particular section ought to be eliminated from the bill.

Senator Smith of Maryland: Has there been any investigation by the Public Utilities Commission to ascertain what is a fair price?

Mr. Darlington: Yes, sir.

* * * * *

Senator Gallinger: After which time, if that finding is accepted and litigation does not ensue, the Public Utilities Commission will proceed upon that basis to determine what a fair rate is.

Mr. Reeside: To fix the rate.

Mr. Darlington: *And even if litigation does ensue the Public Utilities Commission Act provides that the rate fixed by the Commission shall be in force until the court disturbs it.*

* * * * *

Mr. Smith of Maryland: Mr. President, the Utilities Commission has been appointed for the purpose of determining the price that the people should pay this city, but there is a Utilities Commission appointed for that purpose. They have every means in their possession for determining what is right between the utility corporations and the people, and we felt that it was not our duty to determine what gas should be sold for in the District of Columbia until that valuation should be made.

In fact, so far as I am concerned, I do not feel that it is incumbent upon me to determine what the value of gas is in this city, *but there is a Utilities Commission appointed for that purpose with*

all the authority needed to get all the information that it is possible upon the subject and to determine it. We felt that for the present it was better to leave it until they had an opportunity to determine it, to put it over until they would be in a position to determine what should be charged. That is the reason which moved your committee to determine as it did to leave it over until the Public Utilities Commission could determine it for themselves.

The Presiding Officer: The question is on concurring in the amendment.

The result was announced yeas 17, nays 32.

So the amendment was nonconcurred in.

Mr. Norris: I offer the amendment which I send to the desk.

The Presiding Officer: The amendment will be stated.

The Secretary: On page 119 it is proposed to strike out Section 6 and in lieu thereof to insert the following:

Sec. 6. On and after the first day of October, 1916, the Washington Gas Light Company shall not charge or collect for gas furnished a consumer in any part of the District of Columbia a rate in excess of 75 cents per 1,000 cubic feet of gas so furnished: *Provided*, That if a consumer of gas other than the Government or the District of Columbia shall not pay monthly any gas bill within 10 days after the same shall have been presented, said gas company may charge and collect from any such consumer so failing to pay said gas bill as aforesaid 10 cents additional for each 1,000 cubic feet of gas represented by said bill: *And provided further, that nothing contained herein shall be construed as limiting or taking away any of the powers now vested by law in the*

Public Utilities Commission of the District of Columbia.

* * * * *

Mr. Norris: Mr. President, the Senate has just decided on a roll-call vote that the provision shall remain in the bill limiting the price of gas to 70 cents to the Government. That provision was originally put in after the Public Utilities Commission Act passed, as I have before called to the attention of the Senate. *The amendment that I have suggested, specifically provided that it shall not interfere with the Public Utility Commission.* There is not any doubt, however, that when the Public Utility Commission gets through with their investigation they will fix the price at a lower rate than is fixed in the amendment. There cannot be any possible doubt of that when we take into consideration the fact that the company is paying 24 per cent dividends, and at the rate fixed if they sold the same amount of gas, from their own figures, they would have paid 15½ per cent dividend on their entire capital stock, one-half of which is water. Now, Mr. President, I desire to modify my amendment. *Instead of striking out Section 6,* I desire to have the amendment *follow* line 22 on page 119, and I desire to put in the word "private" after the article "a" and before the word "consumer," so that it will read: (Italics ours.)

and here follow the words of the bill exactly as finally enacted into the present law heretofore set out.

When it is borne in mind that the original Section 6 related only to the fixing of a government rate, and that the Senate declined to adopt it until the amendment reserving all powers theretofore granted to the

Utilities Commission was made a part of the Amendment, there can be no doubt of the proposition that the Act of 1916 still retains to the Commission the *power* to fix the Government rate and imposes upon it the *duty* to determine and fix such rate, in just the same respect and to the same extent that the power is still reserved to determine and fix a rate to be charged to the private consumers.

The Action of the Commission in Fixing the 90 and 95 Cent Rates to the Private Consumers Without at the Same Time Determining and Fixing a Reasonable Rate to the Governments, and, of course, Without Regard to Such Government Rate, Was Beyond the Authority of the Commission and Illegal.

As sustaining this conclusion we cite the case of *Southern Pacific* v. *Interstate Comm. Comm.*, 219 U. S. 433, wherein the Court said, quoting from pages 441 and 444:

> It was alleged that the Commission, in setting aside the increased rate of $5 and fixing substantially the old rate, had exceeded the powers conferred upon it by law, because it did not act in the exercise of the authority conferred upon it to determine whether a rate was just and reasonable in and of itself with regard to the service rendered but had proceeded upon the assumption that power was conferred upon it to fix an unreasonable rate because of its belief as to the equities of the situation or upon the basis of principles of estoppel or upon its conception of public policy and its right to enforce what was deemed best under the circumstances, for the interest of shippers.
>
> * * * * * * * * *

> It is clear, therefore, as we have said at the outset, that the result of the contentions and concessions of the respective parties is to reduce the controversy to a single issue, which is, What was the nature and character of the order made by the Commission? That is, What, in substance, was the power which the Commission exerted in making the order?
>
> Coming to the consideration of that subject, we are of the opinion that the court below erred in not restraining the enforcement of the order complained of, because we see no escape from the conclusion that the order was void because it was made in consequence of the assumption by the Commission that it possessed the extreme powers which the railroad companies insist the order plainly manifests.

In the instant case the same conclusion must follow for the reason that the orders here attacked were made in consequence of the assumption by the Utilities Commission that it possessed the power to fix a gas rate to private consumers without regard to other consumers in the District of Columbia and in absolute disregard of the requirements of the Utilities Act that all rates shall be reasonable and non-discriminatory, and in consequence of the further assumption that it did not possess the power to determine and fix rates to the General and District Governments and others not private consumers.

The Appellants' Rights are not Barred by Paragraph 65 of the Public Utilities Act.

This paragraph provides as follows:

> That every proceeding, action or suit to set aside, vacate, or amend any determination, or or-

> der of the Commission, or to enjoin the enforcement thereof, or to prevent in any way such order or determination from becoming effective shall be commenced and every appeal to the courts or right of recourse to the courts shall be taken or exercised, within one hundred and twenty days after the entry or rendition of such order or determination, and the right to commence any such action, proceeding or suit, or to take or exercise any such appeal or right of recourse to the courts, shall terminate absolutely at the end of such one hundred and twenty days.

Attention of the Court is here directed to the fact that the defense based on the statute of limitations relates only to the first order of the Commission, and not to the order increasing the rate prescribed in that order to 95 cents, for the reason, as appears in the Bill, that the latter order was issued on March 15, 1919, and the Bill was filed on May 15, 1919.

The limitation of 120 days is not one against an action to enjoin the enforcement of a rate illegal in and of itself such as, we submit, has been shown to be true as to the rates prescribed in both of the orders made the basis of the appellants' complaint. The Bill, in addition to stating facts that show the first order to be unconstitutional and void and praying to have said order vacated and set aside, also prays as follows:

> That the defendant, the Washington Gas Light Company be perpetually enjoined from charging for its gas furnished to private consumers in the District of Columbia any price in excess of that provided in the aforesaid Act of Congress of September 1, 1916, to-wit: 75 cents per thousand cubic feet.

There is nothing in the statute precluding a bill to enjoin any utility from charging an unlawful rate. Indeed, the law specifically provides in paragraph 93 that—

> This section shall not have the effect to release or waive any right of action by the United States, or by the District of Columbia, *or by any person, for any right*, penalty, or forfeiture which may have arisen or which may hereafter arise *under any law of the United States* or any regulation in force in the District of Columbia (Italics ours).

Therefore, to hold that the appellants' rights for relief against unconstitutional restrictions and demands, such as denial of the right to appeal to the courts and to protect themselves against an unjust deprivation of their property, is precluded by the statute in question, is clearly to disregard the provisions of the paragraph just quoted.

To hold otherwise would be to conclude that an unconstitutional order or rate through the medium of a statute of limitations is thereby rendered valid and enforcible because not attacked within the statutory period of 120 days. Or, in other words, a lapse of time prescribed in the statute, and during which no action is taken by the parties affected, renders legal an order or rate invalid from the beginning.

This, however, is contrary to an established principle of law which is, that "an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed." *Norton* v. *Shelby Co.*, 118 U. S. 425, 442. Therefore, this being true, it is not to be

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presumed that Paragraph 65 of Section 8 of the Public Utilities Act contemplates foreclosing to parties directly affected, a resort to the courts for relief and protection against orders and rates illegal in themselves, as are the orders and rates herein complained of.

If Paragraph 65 Should be held to Relate to the First Order Made a Basis of Complaint and to Preclude the Assertion of the Appellants' Rights as set out in the Bill, then such Limitation is Unconstitutional and Void.

As set out in the Bill and as, we submit, conclusively shown herein, appellants, since the date of the first order of the Commission, have been, now are, and until said orders are vacated by a court of competent jurisdiction, will continue to be required to pay a rate that is illegal to the extent that it exceeds the 75 cent rate to private consumers as fixed by the Acts of September 1, 1916. The court of competent jurisdiction is the Supreme Court of the District of Columbia. If as ruled by that court, the statute of limitations prohibits the relief sought as to the first order, appellants have no relief, which is in effect, a denial of a fundamental right guaranteed by the Constitution. A case in point as to the effect of such a statute of limitations is that of *Wight* v. *Police Jury*, 264 Fed. 705, 714.

The opinion is by Circuit Judge Batts, from which we quote rather extensively:

> Fifth Point. Appellant's "fifth point" is to this effect:
>
> "Plaintiff is not estopped or precluded at this time from questioning the validity of the bonds and taxes in question."

In elucidation of this point he makes the following additional proposition:

> "That the limitation of time within which action may be brought under section 17 of Act 256 of 1910, giving to this section its most liberal interpretation, is confined to and relates only to suits contesting the regularity, formality and legality of elections held in pursuance thereof. If, however, the prescription established by said section of said Act be constructed as a bar to fundamental and constitutional objections, it is void and unconstitutional. It is not competent for the legislature to provide that the constitutionality of an act passed by it shall not be contested unless such action be begun within a limited time."

Section 17 of Act 256 of 1910, provides: "That for a period of sixty days from the date of the promulgation of the result of any such election, any person in interest shall have a right to contest the legality of such election for any cause; after which time no one shall have any cause of action to contest the regularity, formality or legality of said election for any cause whatever. If the validity of any election held under the provisions of the Act is not raised within sixty days herein prescribed, then no governing authority of any subdivision herein named, required to levy a tax or issue bonds as authorized at an election or under this Act, shall be permitted to refuse to perform that duty, and urge as an excuse of reason therefor that some provision of the Constitution or law of Louisiana has not been complied with, but it shall be conclusively presumed that every legal requirement has been complied with, and no court shall have authority to inquire into such matters after the lapse of sixty days, as herein provided."

The law of which this is a part, provides for

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the calling of an election, to be held in a prescribed way, at which resident taxpaying voters shall determine whether bonds may be issued for prescribed purposes, in an amount limited by the Constitution. If the election be one called by a body not authorized, to be voted at by persons not authorized, for purposes not authorized, the section would have no application. Assuming the election to be one to which the article applies, a period of sixty days is prescribed after the promulgation of the result, within which any person in interest shall have the right to contest the legality of the election for any cause. It is prescribed that after this time no person shall, for any cause, contest the regularity, formality or legality of the election. It is clearly within the power of the legislature to preclude inquiry into the regularity or formality of the election after a short period of prescription. If by the "legality of the election" is meant anything more than that the election was held in the way prescribed by law, the meaning certainly can not be so extended as to make it the effect of the law that a failure to attack the election would bring about consequences which could not have been accomplished by a valid election. If persons charged with the duty of administering these constitutional provisions, and the legislation enacted in response to them, should disregard the constitutional limitations, failure to attack their action for sixty days could not, ordinarily, be held to give validity to that which would otherwise be void. No act of the legislature can take away from the property owner, whose property is affected, the right to have constitutional burdens measured by the limits of the Constitution. Nor can the legislature compel an officer to do that which is contrary to the Constitution, and, therefore, fundamentally illegal, merely because no one had chosen, within the period of the prescription,

to question the legality of that which had heretofore been done.

* * * * * * * * *

The Supreme Court of Louisiana, in *Crow* v. *Supervisors*, 141 La., 1017, in which the Act under consideration was discussed, used this language:

> "The law-maker has provided a method by which certain public works may be constructed through taxation of property * * * and in so doing has recognized the right of owners * * * to raise all the legal and constitutional objections that they think proper; but it has * * * declared that the right so recognized must be exercised in time and not throughout eternity."

We do not understand that the court intends, by the use of this language, to suggest that constitutional provisions may be disregarded, and that, after the lapse of the short period prescribed by the Act, the result is the same as if the limitations of the Constitution did not exist. The case under consideration called for no such comprehensive statement, and other holdings of the opinion negative such an intention.

The views of the court are doubtless expressed by the opinion in *Daigle* v. *Opelousas G. & N. E. Ry. Co.*, 124 La., 1047. The case was one in which a justice ward, as distinguished from a police jury ward, held an election under Act 202 of 1898, to carry into effect article 270 of the Constitution of 1898. The court held that no election could be legally had in such a subdivision, and used this further language:

"If this conclusion be correct, the police jury of the parish was absolutely without authority to order the election, and the situation is the same as if no election had been held, and prescription

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is not applicable. *Estees* vs. *Board*, 121 La., 991. In *Dimmick* vs. *Opelousas, G. N. & N. E. Ry. Co.*, 123 La., 123, the court drew a clear distinction between a suit contesting an election and a suit to annul a tax voted at a void election. If a void election can not be cured by prescription it can not be cured by the mere inaction of taxpayers."

The opinion in *Crow* vs. *Supervisors*, further, however says:

"And the power of the state to limit the time within which rights, whether derived from constitutions or elsewhere, are to be asserted in her courts, is as well recognized as the rights themselves."

If by this is meant that statutes which are unconstitutional may be enforced, if not attacked within the prescribed periods; or if it be held to mean that officers are under obligations to do things prohibited by the Constitution, if they are not directed by the courts within certain periods to abstain from doing them, the proposition made is not in accord with recognized principles.

The 90 and 95 Cent Rates are Unreasonable and Unduly Discriminatory in and of Themselves when Considered in Connection with the Rates Charged to the Governments and Others not Private Consumers.

As bearing on the question of the unreasonableness and the discriminatory nature of the 90 and 95 cent rates to the private consumer, aside from the fact that they are confiscatory (which will be discussed under that heading), attention is called to the great disparity between the Government rate and that paid by private individuals. In the case of *Wilcox* vs. *Consolidated Gas Co.*, 212 U. S. 19, this Court sustained the consti-

tutionality of a statute of New York which made a five-cent lower rate to the City of New York than to the private consumers. In support of the constitutionality of that law it was argued that a discrimination of five cents in favor of the city was not unjustly discriminatory, the city standing in the position of a wholesale consumer or buyer and the cost of supplying the city being less than the cost of supplying other consumers. In sustaining the legality of such discrimination the Court, on page 54 said:

> We see no discrimination which is illegal and for which good reasons could not be given.

So, in the Act of 1916, wherein Congress fixed a temporary rate of 70 cents to the Governments and 75 cents to the private consumers in the District of Columbia, a legislative sanction was thereby placed upon a disparity of five cents in favor of the Governments. We do not insist that it is not possible that after full investigation the Public Utilities Commission would be justified in finding that a disparity even greater than five cents would not be unduly discriminatory. We do insist, however, that the bill alleged facts showing that there was no legal foundation on which to base a finding that the rates to be charged the private consumer in the District of Columbia should exceed the Government rate by as much as 20 or 25 cents per thousand cubic feet.

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The 90 and 95 cent Rates are Unreasonable and Unduly Discriminatory When Considered in Connection with the Rates Actually Paid for Gas for Municipal Purposes, Park Lamps, and Street Lamps, for the First Nine Months of the Year 1918, Respectively 69.75 cents, 35.85 cents, 40.18 cents, as Alleged in the Bill and Shown in the Plaintiff's Exhibit B. (Rec., p. 14.)

At these prices paid by the District Government and the prices received for gas used in the United States Government buildings, the average price received for all by the Gas Company for the nine months involved, as shown by the Company itself, was only 52.15 cents per thousand cubic feet. This, of course, is clearly an undue discrimination against the private consumer, and for which no justification was attempted to be made.

The 90 and 95 cent Rates Prescribed by the Orders of the Public Utilities Commission are Confiscatory, Depriving Appellants of their Property Without Due Process of Law; and Such Orders are Therefore Unconstitutional and Void, and This Regardless of Whether the Commission has Power to Fix Rates to the Governments and All Others Not Private Consumers.

The Bill alleged facts showing that the basis for the applications for increased rates allowed in Formal Cases Nos. 13 and 70, was that the Gas Company at the existing rates was not able to make expenses and receive a reasonable income on its investment. The opinions of the Commission which constituted a part

of the plaintiff's bill show that it was on this ground that the increased rates were allowed. It was alleged in the bill that the cost of producing gas at the burner for the year 1918, as estimated by the Gas Company, through its counsel, Mr. Minor, at the first hearing on December 18, 1917, would be 79½ cents. It was also alleged that at the hearing on the second application for an increased rate from 90 cents, it was shown to the Commission that if the private consumer had paid 90 cents for the *entire* year 1918, and had the General and District Governments paid the same rate instead of the rate they actually did pay, the Company would have made expenses and received a return of approximately 6 per cent. These facts taken in connection with other allegations in the Bill, particularly those in Paragraph 14, set forth a clear case where the appellants' property, since the effective date of the first order complained of, has been and still is being taken to make up losses accruing to the Gas Company by reason of its furnishing its products to the Government and companies not private consumers, at less than cost of production, and to make up in addition a reasonable profit to the Company on the gas so furnished.

The decision of this Court in *Wilcox* v. *Consolidated Gas Co., supra,* we submit clearly sustains the appellants' contention herein. In that case, the Gas Company objected because a 5-cent lower rate was fixed by statute to the City of New York than was fixed to the private consumer. But this Court said it is not for the Gas Company to complain of the lower rate unless on account of such rate it is on the whole unable to realize a reasonable return on its investment.

In sustaining the constitutionality of the law, it was said:

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> Neither the city nor the consumers are finding any fault with it, and the only interest of the complainant in the question is to find out whether, by the reduced price to the city, the complainant is upon the whole unable to realize a return sufficient to comply with what it has a right to demand.
> * * *
>
> "We cannot see from the whole evidence that the price fixed for gas supplied to the city by the wholesale, so to speak, would so reduce the profits from the total of the gas supplied as to thereby render such total profits insufficient as a return upon the property used by the complainant."

In the instant case the complainants occupy the position suggested in the *Wilcox Case* in that they *are* the consumers and are put in the position that by reason of the reduced price to the city and others not private consumers, they are required to make up the loss the company thereby sustains and also a reasonable profit on the amount so furnished.

Question was made at argument before the Court of Appeals as to whether a different rule might not apply in the instant case from that held to apply in the *Wilcox Case* by reason of the fact that in the latter case the suggested confiscation or taking of property without due process, arose under an act of the State Legislature, while in the case at bar it arises under an act of Congress. The only difference is that the *Wilcox Case* involved the Fourteenth Amendment to the Constitution and the case at bar involves the Fifth Amendment, the rule as to due process being the same. In the Case of *Wilson* v. *New*, 243 U. S. 332, 376, this Court, in considering the Act of Congress of September 3, 5, 1916 (39 Stat. 721), said:

> And though it is a regulation of commerce, it is void if it conflicts with the provisions of the Fifth Amendment, that no person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Lynch*, 188 U. S. 445, 471; *Adair* v. *United States*, 208 U. S. 161, 180; *United States* v. *Cress*, 243 U. S. 316.

It was also suggested in the Court of Appeals that the orders made the basis of complaint in appellants' bill do not effect a confiscation because the complainants are not compelled to use gas. The answer to this is well stated in the words of this Court in the *Wilcox Case, supra, p.* 52:

> The complainant has a monopoly in fact, and a consumer must take gas from it or go without. He will resort to the "old stand," because he can not get gas anywhere else.

Judicial notice may be taken of facts of such common knowledge that in the District of Columbia there is only one source of gas supply, and that unless the private consumer sees fit to pay the price fixed by the Utilities Commission and charged by the Gas Company, his supply of a necessary product will be cut off. Judicial notice may also be taken of the additional fact that unless that product is obtainable, the value of appellant's property and business in the District will depreciate and the cost of equipping their buildings with gas appliances and fixtures will be a total loss.

As to whether such a condition would not amount to

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confiscation the attention of the Court is called to the case of *Hooker* v. *Interstate Commerce Commission*, 188 Fed., 242, 248, wherein the Commerce Court in considering a similar question involving an alleged confiscatory railroad rate fixed by the Interstate Commerce Commission, said:

> Second. Is it shown beyond reasonable question, by the present record that the schedule of rates contained in the order of the Commission complained of clearly violates the Fifth Amendment to the Constitution of the United States by taking the property of the petitioners without due process of law or without just compensation if the taking is for a public purpose?
>
> It seems to have been decided in the case of *Board of Railroad Commissioners, etc.* v. *Symms Grocery Co. et al.*, 53 Kan. 207, 35 Pac. 217, that the shipper can not invoke these constitutional provisions for the reason that he is not obliged to ship; that he may utilize the rate prescribed or not. We are not impressed with the soundness of this decision. The logical result of such a holding as applied to the facts in the present case would be equivalent to saying to the shipper, "You may pay an unconstitutional rate or go out of business;" and we do not think that the protection of the Constitution is held on any such condition.

It is therefore submitted that the rates fixed in the orders, Nos. 254 and 314, are confiscatory and that the orders of the Utilities Commission prescribing such rates are unconstitutional and void.

that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence.' *Tang Tun* v. *Edsell*, 223 U. S. 673, 681: *Chin Yoh* v. *United States*, 208 U. S. 8, 13; *Low Wah Suey* v. *Backus*, 225 U. S. 460, 468; *Zakonaite* v. *Wolf*, 226 U. S. 272; or, if the facts found do not, as a matter of law, support the order made. *United States* v. *B. & O. S. W. R. R.*, 226 U. S., 14; *A. C. L.* v. *N. C. Corp. Com*, 206 U. S. 1, 20."

It is therefore submitted that the failure of the Utilities Commission to give the statutory notice as alleged in the Bill rendered the order made in pursuance of the nearings on the application for the second rate increase, null and void. See also *Wilmington City Ry. Co. et al.*, v. *Taylor et al., Board of Public Utilities Commissioners of City of Wilmington*, 198 Fed., 159

WHEREFORE, it is respectfully submitted that for the reasons assigned the orders of the Utilities Commission prescribing the 90 and 95 cent rates for gas furnished private consumers, are void; that the only legal rate to be charged the private consumer of gas in the District of Columbia is the statutory rate of 75 cents per thousand cubic feet; that plaintiffs are entitled to a refund of all amounts paid above said statutory rate to date; that plaintiffs' bill stated facts sustaining their rights to such relief from the Supreme Court of the District of Columbia and to a decree from that court setting aside said orders, and that the Court of Appeals erred in affirming the decree of the Supreme Court of the District dismissing appellants' bill.

Respectfully,

ROSCOE F. WALTER,
Attorney for Appellants.

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IN THE

Supreme Court of the United States

OCTOBER TERM.

No. 397.

WILLIAM HOLLIS AND SAM GOODMAN,
Appellants,

vs.

CHARLES W. KUTZ, CHAIRMAN; LOUIS BROWNLOW AND W. GWYNN GARDINER, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, AND AS SUCH CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, AND THE WASHINGTON GAS LIGHT COMPANY,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

REPLY BRIEF FOR APPELLANTS.

APPELLANTS' RIGHTS NOT BARRED BY 120-DAY LIMITATION.

On pages 4 and 5 of the Gas Company's brief, it accepts the conclusion of the Supreme Court of Louisiana in *Crow* v. *Supervisors*, 141 La., 1017, cited in *Wight* v. *Police Jury*, 264 Fed. 705, 714, relied upon in appellants' brief, pages 39-43, saying:

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> The view of the Supreme Court of Louisiana in *Crow* v. *Supervisors*, 141 La., 1017, quoted at page 36 of the brief, we submit, states the unquestionable doctrine; namely, that, while the law-maker must recognize the right of the owners of property to raise all legal and constitutional objections to a measure which they may think proper, it may nevertheless be declared that "the right so recognized must be exercised in time and not throughout eternity."

While the Gas Company recognizes this as the unquestioned doctrine, the 5th Circuit Court of Appeals, as appears in the continuation of its opinion, page 42 of appellants' brief, says:

> We do not understand that the court (in 141 La., 1017) intends, by the use of this language (that above quoted and approved by the Gas Company) to suggest that constitutional provisions may be disregarded, and that after the lapse of the short period prescribed by the Act, the result is the same as if the limitations of the Constitution did not exist. The case called for no such comprehensive statement, and other holdings of the opinion negative such an intention.

The Fifth Circuit then quotes from another opinion of the Louisiana Court, wherein it said, pages 42 and 43 of appellants' brief:

> If this conclusion be correct, the police jury of the parish was absolutely without authority to order the election, and the situation is the same as if no election had been held, and prescription is not applicable.

Applying the same rule in the instant case, because of the invalidity of the orders as alleged in plaintiffs'

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bill, the result is the same as if no attempt had been made by the Commission to advance the rate from that fixed by law, and consequently the statute of limitations pleaded by appellees does not run.

Further quoting from the opinion of the 5th Circuit:

> The opinion in *Crow* v. *Supervisors*, further, however, says:
>
> "And the power of the state to limit the time within which rights, whether derived from constitutions or elsewhere, are to be asserted in her courts, is as well recognized as the rights themselves."
>
> If by this is meant that statutes which are unconstitutional may be enforced, if not attacked within the prescribed periods * * * the proposition made is not in accord with recognized principles.

The Gas Company also urges the doctrine of laches as precluding appellants from maintaining their bill.

Aside from the fact that the bill alleges facts showing the illegality of the orders and rates complained *of ab initio* we respectfully submit that the cases cited by the Gas Company are not in point. All those cases relate to transactions wherein the parties sought to have been barred were individuals actually a party to the transaction, and not as in the instant case, one of the general public.

If the orders and rates made the basis of the suit are illegal and void they are such as to all private consumers of gas in the District of Columbia, and as conceded by the Gas Company in its brief on page 5, wherein it says: "If the order was invalid, every consumer of gas in the District of Columbia would be entitled to the same ratio of refund and interest." And

it is submitted that, in fairness to all, such should be the case. If the private consumers of gas in the District have been forced to pay more than the legal rate the excess should be refunded, regardless of the amount and of the resulting depletion in the funds of the Gas Company.

As urged in our main brief, p. 38, citing *Norton* v. *Shelby Co.*, 118 U. S. 425, 442, an unconstitutional act is void for all purposes, and further, as decided by the Louisiana Supreme Court and the 5th Circuit Court of Appeals, the mere inaction of parties whose rights were sought to be affected by such an unconstitutional act, during a period of prescription, does not render such act legal and thereby preclude escape from its unjust enforcement.

That the Public Utilities Law did not contemplate the defeat of the rights of citizens in the District by such construction as that contended for by appellees, is emphasized in our main brief, wherein on page 38 we quote paragraph 93 of the Act and to which appellees refrain from referring.

Now, as bearing upon the equities of the matter, suggested in appellees' brief, we respectfully answer:

1st. The courts can not fail to take judicial cognizance of the fact that, in view of the great cost attached to such a proceeding as that here involved—in the Supreme Court of the District, in the Court of Appeals, in this Court, and in subsequent proceedings, before final judgment is reached and the rights of interested parties determined—it is a rare instance wherein a suit would be prosecuted at all by a private consumer, and if so within the time within which this was filed, to wit, as to the first order, within 14 months, and as

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to the second order, within 2 months. As to the cost of this suit which must be borne by the two plaintiffs, it is readily to be seen that in case of final judgment in their favor the amount of recovery will not begin to pay the costs of prosecution. Is it to be wondered at, if suit had not been filed at all? As a general rule the public is inclined to accept what they may know to be unconscionable and illegal burdens, rather than to resort to litigation, such as that in question, which, regardless of the outcome, is sure to result in financial loss as well as a great expenditure of time and energy. It has been thoroughly established that acquiescence for no length of time can legalize a clear usurpation of power where the people have plainly expressed their will in the constitution, and appointed judicial tribunals to enforce it. "It has been shrewdly pointed out that power is frequently yielded to merely because it is claimed, and that it may be exercised for a long period in violation of the constitutional prohibition without the mischief which the constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question. Such circumstances can not be allowed to sanction a clear infraction of the constitution." *Pingree* v. *Auditor General*, 120 Mich. 95, 78 N. W. 1025; *State* v. *Wightson*, 56 N. J. L. 126, 28 Atl. 56; *State* v. *Beacon*, 66 O. St. 491, 64 N. E. 427; *Harrison* v. *Willis*, 7 Heisk (Tenn.) 35, 19 Am. Rep. 604.

2nd. The Gas Company can not complain of an adverse judgment in case the orders of the Utilities Commission attacked in plaintiffs' bill are held illegal. The action of the Commission in promulgating the orders complained of, was at the instance of the learned coun-

sel of the Company and in the way pointed out to said Commission by such counsel as the legal way. Should the Gas Company feel that an adverse judgment works a hardship to it, is it any more of a hardship than it was and is, on the private consumer to be deprived of his property without due process of law? It is remindful of the remark of Justice Moody in the case of *St. L. I. M. & S. Ry. Co.* v. *Taylor,* 210 U. S. 281, 296, in discussing the question of hardship to the carrier arising by reason of the absolute character of the Federal safety appliance law, in suits for damages resulting from injuries due to the absence of safety appliances from cars, required by statute, wherein it was said that the burdens should be thrown upon those "who could measurably control their causes instead of upon those who are in the main helpless in that regard."

APPELLEES' DENIAL OF FACTS ALLEGED IN BILL NOT A QUESTION INVOLVED.

At pages 5 and 6 of its brief the Gas Company takes exception to the allegation in the bill that the Gas Company furnishes gas to the United States, the District of Columbia and others, not private consumers, at a rate below the statutory rate of 70 cents. It is also true that appellants further alleged in their bill the additional facts that the same is furnished at far below the cost of producing gas at the burner, which, as claimed by counsel for the Gas Company at the hearing, was 79½ cents. *Whether or not these allegations are true is not a matter involved in this appeal. The question here is whether the facts alleged state a cause of action.* If gas is furnished to others than private consumers at a loss, and this loss is required

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to be made up by such private consumers of gas, also a reasonable profit on the gas so furnished at less than cost of production, we submit the same constitutes a taking of the property of the private consumer without due process of law. And notwithstanding the fact that the mains, service pipes, and distributing plants are in the streets, which are the property of the Governments, it is confiscation for the further reason that the part payment of these Governments' gas bills is entirely borne by the private consumers of gas in the District of Columbia and by them only, and not by the entire public.

THE FACT THAT THE GOVERNMENT OWNS THE STREETS, NO DOUBT, WAS A MATTER, AMONG OTHERS, CONSIDERED BY CONGRESS WHEN IT FIXED A FIVE-CENT LOWER RATE FOR GAS USED FOR LIGHTING PUBLIC BUILDINGS THAN FOR THAT FURNISHED TO PRIVATE CONSUMERS, AND WHEN IT PRESCRIBED A FLAT RATE PER LAMP PER ANNUM FOR GAS USED IN LIGHTING STREETS, PARKS, ETC.

As pointed out in appellees' brief, pages 6 and 7, Congress for years has been fixing the rates for gas furnished the General and District Governments, and also for that furnished the private consumers. Practically all, if not all, the time since 1882, the rates so fixed for gas used in lighting streets, alleys, parks, etc., have been taken care of in the annual appropriation bills for the district of Columbia at a maximum price of so much per lamp per annum. By an act of Congress of June 6, 1896 (29 Stat. L., p. 251), rates

for gas furnished to the Governments and to private consumers were established in a provision as follows:

> "That the Washington Gas Light Company of the District of Columbia is authorized to charge and collect, after the first day of July, eighteen hundred and ninety-six, for illuminating gas furnished to and paid for by private consumers in the District of Columbia, at the rate of not exceeding one dollar and ten cents per thousand cubic feet, until the first day of July, nineteen hundred and one, after which last-named date the rate shall not exceed one dollar per thousand cubic feet; and that after the first day of July, eighteen hundred and ninety-six, the Washington Gaslight Company of the District of Columbia shall furnish to the United States Government and the District of Columbia gas at the rate of one dollar per thousand cubic feet: Provided, That if consumers other than the Government shall not pay monthly any gas bill within ten days after the same shall have been presented, said company may charge and collect from said consumer so failing to pay said bill as aforesaid one dollar and twenty-five cents per thousand cubic feet for the gas furnished to said consumer during said month."

It is thus to be seen that from 1896 until 1901 the Government rate fixed by Congress was 10 cents less than that allowed to be charged the private consumer. After 1901, the rate to the latter was reduced to the rate prescribed for the Government, with the provision that unless consumers other than the Government should pay their bills within 10 days after the same shall have been presented there would be an additional charge of 25 cents per thousand cubic feet. The act of 1916, heretofore referred to, prescribed a five-cent lesser rate to the Government for gas used in lighting

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public buildings than that established as a maximum to be charged private consumers. This legislation is a clear recognition by Congress that the Government rate should be some less than that to be paid by others. Is it to be presumed that this differential was arrived at by Congress in a haphazard way? There can be but one conclusion, we submit, and that is, that because of all the circumstances, one of which was that the Government owns the streets in which the Gas Company's mains, service pipes, etc., are placed, the Government is entitled to a somewhat lower rate than that which others should pay. According to the Gas Company's contention, pages 7, 14 and 15, no allowance has been made for this concession by the Government, and now when the company asks for an increased rate because of advances in costs of producing and delivering its product at the burner, which by the orders complained of in this proceeding have been loaded entirely onto the private consumer, it attempts to justify no increase in the Government rate by saying that such action, or non-action, rather, is warranted because of the fact that the Government owns the streets. Counsel for the Company seem to have forgotten the statement of Mr. Minor, one of its attorneys, at the hearing before the Utilities Commission in formal case No. 13, when he said: "We are not likely to get this $1.10 rate (the rate sought when the 90-cent rate to the private consumer was prescribed) out of the Government, because they have not appropriation enough. *We think it is fair the Government should pay this with the private consumer.*" (See appellants' main brief, pages 26 and 27.) On pages 14 and 15 of the Gas Company's brief they present this question: "If the Company were required by Congress to remove its mains, service

pipes, street boxes, and other plant construction from their present situs in and under the streets and public spaces of the city and to locate them upon or under lands now in private ownership, to be acquired by contract or condemnation on payment of due compensation, could plaintiffs successfully maintain in the courts that the increased cost of gas to them which would result from the requirement was a taking of their property without due process or was otherwise in violation of their constitutional rights?" Under such circumstances there would result an increase in the cost of gas used both by the Government and private consumers, and if the entire cost were placed on the latter it would result in an unconstitutional burden being placed on them.

GENERAL GOVERNMENT NOT NECESSARY PARTY DEFENDANT TO BILL NOR EVEN A PROPER PARTY.

The Gas Company now says, but did not so contend in the trial court, that the United States should have been made a party, citing cases in no way analogous to the one at bar. We are content to answer this by saying that the United States is not an indispensable or necessary party any more than is any other consumer of gas in the District. This suit is based upon illegal action of the Utilities Commission and the consequent illegal rates for gas now being charged the private consumers. The fact that the District and General Governments are now securing gas far below cost of production at the expense of the private consumers does not constitute them indispensable or necessary parties in a suit where the private consumer is

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seeking to have set aside an unreasonable and discriminatory rate.

PLAINTIFFS' CLAIM AS TO INSUFFICIENCY OR FAILURE OF NOTICE RELATES ONLY TO THE SECOND ORDER.

The Gas Company urges that as to the first order "the bill does not claim any defect or insufficiency in the notice given, or that the plaintiffs did not receive it," etc. This is true, and that is not the ground of the illegality of that order claimed in the plaintiffs' bill. The claim of illegality as to want of notice relates only to the second order of the Commission.

PLAINTIFFS' DEMAND FOR TRANSCRIPT OF RECORD OF HEARINGS BEFORE THE COMMISSION.

The Gas Company's brief also refers to that portion of the bill which calls upon the Commissioners to furnish, for the use of the plaintiffs, a free transcript of the hearings, on the Company's applications for increased rates, as contemplated in paragraphs 53 of the Act. Whether under the statute the plaintiffs are entitled to this or not does not warrant a dismissal of the bill. There still can be no doubt but that a complete copy of the record in both hearings would under paragraph 52 of the Act have to be furnished to the trial court. When the purpose of the provision of the statute authorizing a free copy of the same "to any party to such investigation" is considered, and especially when it is noted that in the statute it is used in connection with proceedings to be had in the Supreme Court of the District, there can be little ques-

tion but that "any party to such investigation" contemplates any party making the appeal whether the same did or did not enter an appearance before the Utilities Commission. When that party by appeal to the Supreme Court of the District questions the legality of the action of the Commission he certainly to that extent becomes a party to the full investigation. But, be this as it may, the inclusion of this matter in the bill would be no more than surplusage and would not justify dismissal, as said before.

APPELLEES' OBJECTION TO BILL THAT SAME SHOULD HAVE BEEN FILED ON BEHALF OF ALL CONSUMERS IN THE DISTRICT, NOT SUSTAINABLE.

We submit that this objection is without merit.

In *Chas. Simmons Sons Co.* v. *Md. Tel. & Telegraph Co.*, 99 Md., 141, 57 Atl. 193, it was held that a bill by several parties to enjoin a telephone company from charging them higher rates than a city ordinance permits, is not objectionable although it alleges a contract by each of them with the company.

Also in *Ignatz* v. *City of Knoxville*, 1 Tenn. Ch. App., 1, a bill by several persons of the same class who have suffered injury by an attempt to enforce an illegal tax against them, seeking to prevent the collection of such illegal tax, is not demurrable for mutifariousness.

Appellants' bill is against the same defendants, arises from a common cause, involves similar facts, and presents causes of action governed by the same legal principles. See *Chicago Telephone Co.* v. *Ill. Mfrs. Assn.*, 106 Ill. App., 54, 56, 57. In that case it was said:

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"We are of the opinion that the fact that the complainants' claims are to a degree separate and distinct does not make the bill altogether multifarious, and that the common right of all the complainants, as above stated, enables them to join in one bill. *Chicago* v. *Collins*, 175 Ill., 445; *German Ins. Co.* v. *Van Cleave*, 191 Ill., 410."

See also *Madison* v. *Ducktown Sulphur, Copper & Iron Co.*, 113 Tenn. 331, 83 S. W., 658.

FAILURE OF COMMISSION TO GIVE NOTICE OF HEARING TO PARTY ENTERING APPEARANCE ON BEHALF OF OTHERS RENDERS SECOND ORDER ILLEGAL.

Next, they discuss the alleged failure of notice as to the second order. We submit that the bill fully alleges a failure of notice to Mr. Walter as attorney or representative of certain citizens of Takoma Park, such as to render action by the Commission, as a result of such failure on its part to comply with the requirements of the Act in that regard, illegal and of no effect. It is of no importance whether the Mr. Walter is the one representing appellants or whether the parties he represented and on whose behalf he entered an appearance at the second hearing are the plaintiffs in the case at bar. The hearing in question extended to the matter of fixing a rate applicable to all private consumers of gas in the District. As such they were all entitled to be heard as provided in the Utilities Act. They were all entitled to reasonable notice—personal notice to all entering appearances and the same to representatives entering appearances on behalf of those not personally appearing. Since the

hearing is on a question affecting the entire District, certainly the entire community is entitled to be heard. If not, how much and what sections of the District should be heard to make the order legal? We submit that the mere statement of the question is an answer. Now, therefore, since a failure to give notice renders the action of the Commission illegal, it must follow that it is illegal regardless of who or how many persons failed to get the notice. Mr. Walter, as representative of certain parties in Takoma Park, was entitled to written notice of the time of the second hearing, to the same extent that others, including the Gas Company, were entitled to. The activity with which he sought to be sure of getting the notice, as alleged in the bill, most likely is surplusage, for the reason that the requirements of the Act place the duty of giving notice entirely on the Commission. The allegation of all the facts was for the purpose of bringing to the attention of the Court the failure of the Commission to fulfill its duties to the public in matters in which the public is trying to assist.

As to Mr. Walter's right to rely on statements of the secretary of the Commission as to the matter of notice, the argument of appellees certainly can not be sincere. We submit that under recognized rules of practice before an administrative body such as the Public Utilities Commission, he was legally entitled to seek information and to rely upon the same from the secretary of that body.

The cases cited in our original brief we think are conclusive on the effect of the failure of notice on the legality of the second order.

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AS TO APPELLEES' INSISTENCE THAT PLAINTIFFS SHOULD HAVE COMPLAINED TO UTILITIES COMMISSION BEFORE APPEALING TO THE COURT.

It is to be noted that no attempt is made by the appellees to reconcile the conclusion of the Court of Appeals on this proposition with the decisions cited in appellants' brief, pages 12-15. It is urged in the Gas Company's brief, pages 8-10, that by reason of appellants' not having appeared before the Commission when hearings were held on the two applications for increased rates resulting in the orders complained of, and by reason of their not submitting to the Commission the complaint they have otherwise instituted in the Supreme Court, they have thereby not complied with the requirements of the Utilities Act, and have undertaken, as the Company alleges, to "cast upon the Courts the burden of hearing the application for an increase in rates anew, upon objections made and upon evidence to be offered for the first time, before the Courts, and with the burden also upon the Public Utilities Commission at the expense of the public, of furnishing transcripts, comprising many hundreds of pages, of the evidence adduced before it, both by the utility and by its own experts and representatives, for use in the court proceedings."

Such is not the case. The relief sought by appellants is not such as could be granted by the Utilities Commission, but it is of a nature that could only be granted by a Court of Equity. The bill is based on the illegal action of the Commission in proceeding in disregard of the requirements of law; on the consequent illegality of the orders made the basis of complaint;

and on the inherent illegality of said orders because of their effecting a deprivation of property without due process of law. As pointed out in our main brief, p. 12, relief from such unauthorized action can be obtained only from a court of competent jurisdiction, and not from a purely administrative body such as the Public Utilities Commission. *Int. Comm. Comm.* v. *L. & N. R. R.*, 227 U. S., 89, 92, and cases cited.

THE LEGISLATIVE HISTORY OF SECTION 6 OF THE ACT OF 1916, THE PROVISIONS OF WHICH ARE QUOTED ON PAGES 23 AND 24 OF OUR MAIN BRIEF, CLEARLY DETERMINES THAT HAD NOT THE SECOND PARAGRAPH THEREOF, RETAINING ALL POWERS FORMERLY POSSESSED BY THE COMMISSION (AND WHICH AS ONCE URGED BY THE GAS COMPANY ITSELF EXTENDED TO THE FIXING OF A RATE TO THE GOVERNMENT) BEEN ENACTED, THE FIRST PARAGRAPH THEREOF FIXING A RATE TO THE GOVERNMENT WOULD NOT HAVE BEEN RESTORED.

The error under which appellees are laboring, as evidenced by their statements in their brief on pages 16 and 17 and which leads them to conclude that the history of the legislation resulting in Section 6 of the Act of 1916, determines that the Commission does not have the power and consequently is not required to promulgate rates to the General and District Governments, is clearly apparent. As heretofore made clear, Section 6 originally consisted only of the first paragraph of the present Section 6. This was voted down

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for the reasons shown in the history of the legislation. Then followed the amendment fixing the 75-cent rate to private consumers which specifically retains to the Commission all powers theretofore possessed by it and which, as we have shown, as once contended by counsel for the Gas Company, extends to the fixing of a rate to be charged the General and District Governments. In view of that proviso, the Senate then restored the original Section 6, which fixed a 70-cent rate for gas to be used in the public buildings of the United States and the District of Columbia, and thereupon adopted the section in its present form. There can be no doubt of the proposition that the first paragraph of that section would not have been enacted had it not been for the second paragraph which specifically provides "That nothing herein contained shall be construed as limiting or taking away any of the powers now vested by law in the Public Utilities Commission of the District of Columbia." Appellees urge that this proviso relates only to the second paragraph and does not go to the provisions of the first paragraph. If they are correct in this connection, in order to be consistent, they must also insist that it does not relate to the third paragraph, and, if so, the Commission has exceeded its authority with respect to the provisions of that paragraph relating to the maximum charge of 85 cents per thousand cubic feet permitted to be made by the Georgetown Gas Light Company for gas for cooking, illuminating and other purposes, for the reason that in both orders attacked by plaintiffs' bill the Commission granted the increased rates to 90 and 95 cents, and made them applicable to gas furnished by both The Washington Gas Light Company and the Georgetown Gas Light Company. It would, however, hardly seem reasonable that

Congress intended by the Act of 1916 to give the Commission power to increase the rates to be charged by one gas company in the district and not give the same power of regulation as to other companies furnishing gas to private consumers.

Appellees fearing the worst as a result of consideration of the entire history of the legislation set out in our brief, cite the case of *United States* vs. *Freight Ass'n*, 166 U. S., 290, 317-18, as sustaining the inadmissibility of such history. We submit, however, that the recent case of *United States* vs. *St. Paul M. & M. Ry. Co.*, 247 U. S., 310, removes any doubt as to the admissibility of the entire history of the Act, as quoted in the original brief. In that case the facts stated in connection with the history of the legislation involved are set out in the margin and are almost identically along the same lines as those we have quoted. In that case Mr. Justice Pitney said, page 318:

> "It is not our purpose to relax the rule that debates in Congress are not appropriate or even reliable guides to the meaning of the language of an enactment. *United States* vs. *Trans-Missouri Freight Ass'n*, 166 U. S., 290, 318. But the reports of a committee, including the bill as introduced, changes made in the frame of the bill in the course of its passage, and statements made by the committee chairman in charge of it, stand upon a different footing, and may be resorted to under proper qualifications. (Cases cited.) The remarks of Mr. Lacey, and the amendment offered by him, in response to an objection urged by another member during the debate, were in the nature of a supplementary report of the committee; and as they related to the matters of common knowledge they may very properly be taken into consideration as

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throwing light upon the meaning of the proviso; not for the purpose of construing it contrary to its plain terms, but in order to remove any ambiguity by pointing out the subject-matter of the amendment. This is but an application of the old law, the mischief and the remedy."

THE FACT THAT PRIOR AND SUBSEQUENT TO THE ENACTMENT OF THE PUBLIC UTILITIES ACT AND THE ACT OF 1916 CONGRESS FIXED RATES FOR GAS FURNISHED TO THE GOVERNMENTS, DOES NOT DETRACT FROM THE SOUNDNESS OF APPELLANTS' CONTENTION THAT THE COMMISSION HAS THE POWER TO FIX GOVERNMENT RATES.

On pages 6, 7, 19 and 20 of the Gas Company's brief it is urged that the action of Congress, year by year, in prescribing rates for lighting streets, parks, etc (22 Stat., 139, 466; 25 Stat., 320, 799; 26 Stat., 300, 1068; 27 Stat., 157, 542; 28 Stat., 252, 751; 29 Stat., 672; 30 Stat., 532, 1052; 31 Stat., 562, 831; 32 Stat., 601, 966; 33 Stat., 375, 896; 34 Stat. 496, 1183; 35 Stat., 287, 702; 36 Stat., 391, 1009; 37 Stat., 181, 952; 38 Stat., 531, 906; 39 Stat., 692, 1020; 40 Stat., 931; and 41 Stat., 80, 849); for lighting public buildings 70 cents per thousand cubic feet (38 Stat., 553, 926; 39 Stat., 272); and for gas furnished to Governments and private consumers (29 Stat., 251; 39 Stat., 272), is irreconcilable with the contention that the Utilities Commission possesses the power to change the Government rates. In all these acts of Congress it is to be noted that the rates fixed are maximum rates, with no restriction that the company could not charge lower rates. In fact, the Gas

Company in 1910 voluntarily reduced its rate to private consumers from the statutory rate of $1.00 fixed by the Act of June 6, 1896, to 90 cents, and in 1911 further reduced it to 85 cents. The last named rate was in effect at the time the Utility Act was enacted and remained in effect until the Act of 1916, when it was reduced by Congress to 75 cents. At the time the Utility Act was passed the Government rate as prescribed by Congress for gas other than that used for lighting streets was that fixed by the Act of June 6, 1896 (29 Stat., 251). At the same time the maximum rate for lighting streets, parks, etc., was fixed by the Appropriation Acts at $18.40 per annum for mantle gas lamps, and $10.00 per annum for street designation lamps, which rate since then and now is in effect, being reenacted each year.

This history of legislation is cited for the purpose of showing the situation at the time the Utilities Act was passed. In the light of this information the attention of the Court is called to certain paragraphs of the Act:

> "Par. 24. That every public utility shall file with the Commision, within a time to be fixed by the Commission, schedules, which shall be open to public inspection, showing *all rates, tolls, and charges which it has established and which are in force at the time for any service* performed by it within the District of Columbia, *or for any service in connection therewith or performed by any public utility controlled or owned by it.* The rates, tolls, and charges shown on such schedules shall not exceed the rates, tolls, and charges *now allowed by law,* and shall be the lawful rates, tolls, and charges within the District of Columbia, and shall

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remain and be in force *until set aside by the Commission.*"

* * * *

"Par. 26. That a copy of so much of said schedules *as the Commission shall deem necessary for the use of the public* shall be printed in plain type and kept on file in every station and office of such public utility where payments are made by the consumers or users, open to the public, in such form and place as to be readily accessible to the public and so as to be conveniently inspected."

* * * *

"Par. 30. * * * The rates, tolls, and charges named therein shall be the lawful rates, tolls, and charges *until the same are changed as provided in this section.*"

* * * *

"Par. 88. That whenever, after hearing and investigation as provided in this section, the Commission shall find that *any rate, toll, charge, regulation, or practice of any public utility in the District of Columbia is unreasonable or discriminatory, it shall have the power to regulate, fix, and determine the same as provided in this section.*"

* * * *

"Par. 94. That, first, *unless the Commission shall otherwise order,* it shall be unlawful for any public utility within the District of Columbia to demand, collect, or receive a greater compensation for any service than the charge fixed on the lowest schedule of rates for the same service under the law in force at the date of the passage of this section."

It is to be observed from a consideration of these paragraphs that the Act contemplates a filing of schedules of all rates established by the utility and prescribed by law, and that such schedules shall remain in

force until changed by an order of the Commission. It is also to be borne in mind that the Commission requires and has on file the Government rates as well as the rates to private consumers. If this were not so, in view of the fact that only maximum rates are prescribed by statute, the Commission would be at a loss to know the rates actually being charged by the various utilities. Such information is necessary in order that the Commission may be able to fix reasonable and non-discriminatory rates as provided in paragraph 88, above quoted. In order that the Commission shall not be hampered in any way in the exercise of its duties in fixing reasonable and non-discriminatory rates a special provision in paragraph 92 was enacted as follows:

> "That the provisions of this section shall be interpreted and construed liberally in order to accomplish the purposes thereof, and where any specific power or authority is given the Commission by the provisions of this section the enumeration thereof shall not be held to exclude or impair any power or authority otherwise in this section conferred on said Commission. The Commission hereby created shall have, in addition to the powers in this section specified, mentioned and indicated all additional, implied, and incidental power which may be proper and necessary to effect and carry out, perform, and execute all the said powers herein specified, mentioned and indicated."

To hold that the power of the Commission does not extend to the regulation of the utilities in their dealings with the Government and its agencies with respect to rates, we submit would be in disregard of the last quoted provisions of paragraph 92, as well as the other

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all inclusive provisions of the entire Act. There runs throughout the entire statute the prominent feature that no user or receiver of any product or service of any utility is excepted from the requirements or applications of its provisions. We therefore submit that to give the Act any other construction than, that in the matter of fixing rates, the Utilities Commission has full power to consider and fix Government rates would be practically to render that Commission powerless to accomplish one of the main objects manifestly intended by the Act. And we submit further that the facts alleged in appellants' bill forcibly presents just such a situation.

AMENDMENT OF BILL BY INCLUDING ALLEGATION OF INADEQUATE REMEDY AT LAW, NOT OBJECTIONABLE.

While the amendment may not have been necessary, it could work no hardship, and was thought best out of an abundance of caution. It is always sufficient if the bill sets forth grounds for jurisdiction. *Seaboard Air Line* v. *Koennecke,* 239 U. S., 352. "The facts stated confer jurisdiction." *Story,* Eq. Pl., Sec. 34.

The Gas Company in its brief, page 13, faintly urges that the plaintiffs in their bill did not allege that the reason the Commission failed to increase the rate to the Government and the District was because of a ruling by that body that it had no power to do so. Whether or not this particular allegation was made, it is sufficient to say that the allegations in the bill, which include the findings and orders of the Commission, conclusively charge facts showing that the rates fixed by that body were made in disregard of the rates

at which gas was furnished to the General and District Governments, which as alleged in the bill and shown in the reports and findings of the Commission were far below the cost of production at the burner, and the Commission made the rates to the private consumer sufficiently high to make up for all losses, and, in addition, give to the Company a reasonable return on its investment.

THE WILCOX CASE.

Lastly, as to the Gas Company's criticism, page 13 of its brief, of appellants' statement of the *Wilcox case* as presented on pages 46, 47 and 48 of the latter's brief. Here again appellees have not fortified themselves. The rates attacked in the *Wilcox case* were not rates fixed by the Gas Commission, and consequently the following statement in appellees' brief, the authority for which is cited as pages 35 and 36 of the report of the case, is not correct, namely:

> "In *Wilcox* vs. *Consolidated Gas Co.*, 212 U. S., 54, the objection urged in opposition to the rate fixed by the Public Utilities Commission was, not as seems to be contended by the learned counsel for the plaintiffs, at pages 37-8 of their brief, whether a difference of five cents per 1,000 cubic feet between a municipality and private consumers was discriminatory; but, as shown at pages 35-6 of the report, that since the Commission was bound to allow a reasonable rate to be charged to the private consumer, and had determined 80 cents per 1,000 cubic feet to be that rate, its order that the Gas Company should furnish gas to the municipality at 75 cents per 1,000 cubic feet was a requirement that it should sell gas at less than a reasonable rate, and was for that reason confiscatory

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and a taking of property without due process of law."

This statement of the Gas Company is not borne out by the report in the *Wilcox case*. In the first place, pages 35-6 of the report, as above referred to by the Company, do not sustain them in their contention that since the New York Gas Commission was bound to allow a reasonable rate to private consumers, which it had fixed at 80 cents, the appellee gas company in that case argued that the order of the same Commission fixing a rate of 75 cents to the municipality was unreasonable and confiscatory. In the second place, the rates considered by the Court in that case were not rates fixed by the New York Commission but were rates fixed by the legislature.

Now, if counsel for the Washington Gas Light Co. will again examine the *Wilcox case* they will find, on pages 40 and 41 of the report, under the opinion of the Court the following:

> "An examination of the record herein, with reference to the questions involved in the merits, shows that the act under which the Gas Commission was appointed was subsequently to the commencement of this suit, declared, on grounds, not here material, to be unconstitutional by the Court of Appeals of New York. 191 N. Y., 123, February 18, 1908. The order made by the Commission must therefore be regarded as invalid. It is not important in this case, because the act of the legislature of 1906 makes the same provision as to the price of gas to consumers other than the city that the order does. We have as remaining to be considered the above mentioned two acts of the legislature."

The contention made by the Gas Company in the *Wilcox case* is stated by the Court on page 54 of the report, wherein the Court said:

> "Lastly, it is objected that there is an illegal discrimination between the city and the consumers individually."

Then follows the conclusion of the Court as set out in our original brief, p. 47.

Respectfully submitted,

ROSCOE F. WALTER,
Attorney for Appellants.

IN THE

Supreme Court of the United States

October Term, 1920.

No. 397.

WILLIAM HOLLIS and SAM GOODMAN,
Appellants,

vs.

CHARLES W. KUTZ, Chairman; LOUIS BROWNLOW and W. GWYNN GARDINER, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, AND AS SUCH CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, AND THE WASHINGTON GAS-LIGHT COMPANY,
Appellees.

PETITION FOR REHEARING

Now come William Hollis and Sam Goodman, appellants, and hereby petition the Court to set aside the judgment heretofore granted in this case and to grant a rehearing, and in support of this petition respectfully say:

The Court erred in affirming the decree dismissing appellants' bill because:

1. It does not appear from the record, neither do appellees contend, that the appellee Gas Company's business was instituted or permitted to be established in the District of Columbia on the condition that the needs of the General and District Governments as to gas shall be satisfied at any price that the Government may fix.

2. It does not appear from the record, neither do the appellees contend, that the appellee Gas Company's plant is operated as a Government institution and for the primary purpose of serving the General and District Governments to the exclusion, if necessary, of the private users of gas in the District of Columbia.

3. Said Gas Company is a private enterprise, doing a public business—one of the public utilities of the District of Columbia—and recognized as such by Congress in the Public Utilities Act, 37 Stats., p. 974.

4. The bill alleged facts showing the Government rate for gas as prescribed by Congress and subject to adjustment or change by the Utilities Commission to be far below cost of production and that the rates to appellants and other private consumers in the District of Columbia as fixed by the Public Utilities Commission in the orders complained of were made sufficiently high to make up the losses which otherwise would be sustained by the Gas Company by reason of said low Government rate, it further appearing in said bill that such rates to appellants and other private consumers in the District were arrived at by advances from the

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statutory rate, and *for the purpose* of enabling "the company to sustain its credit and conduct its business at a reasonable profit."

5. The bill alleged facts showing that the rates to certain excepted consumers in the District, and which rates are subject to regulation by the Utilities Commission, were far below cost of production, and that the rates to appellants and other private consumers in the District as fixed by the Public Utilities Commission in the orders complained of, were made sufficiently high to make up the losses which otherwise would be sustained by the Gas Company by reason of said low rates to such excepted consumers, it further appearing in said bill that such rates to appellants and other private consumers in the District were arrived at by advances from the statutory rate, and *for the purpose* of enabling "the company to sustain its credit and conduct its business at a reasonable profit.

6. The bill alleged facts showing that the rates to the appellants as fixed by the Public Utilities Commission in the orders complained of, are unduly discriminatory *as against them and in favor of the Governments and other excepted consumers* who receive gas from the appellee Gas Company at prices far below cost of production, and that the rates to the appellants as fixed by said Commission in the orders complained of, were made *in disregard* of the rates being charged to the Governments and other excepted consumers, *and when said Commission should have considered and fixed rates to the latter as well as to the former,* and thereby prescribe reasonable and non-discriminatory rates *to all users* of gas in the District of Columbia, as required by the Public Utilities Act. (*Southern Pacific Co.* vs. *Interstate Com. Com.,* 219 U. S. 433.

7. The bill alleged that order No. 314 in Formal Case No. 70, fixing the 95-cent rate to private consumers, prescribed on March 15, 1919, being the second order complained of, was arrived at and made *without the statutory notice of hearing* having been given to certain parties to the hearing. *Interstate Com. Com.* vs. *L. & N. Railroad,* 227 U. S., 88.

THE JUDGMENT OF THIS COURT AFFIRMING THE DISMISSAL OF APPELLANTS' BILL, AS EVIDENCED BY THE OPINION, IS BASED CHIEFLY ON THE CONCLUSION THAT THE GENERAL GOVERNMENT WHEN IT ALLOWED THE ESTABLISHMENT OF GAS WORKS IN THE DISTRICT OF COLUMBIA DID SO ON THE CONDITION THAT ITS NEEDS AND THAT OF THE DISTRICT SHOULD BE SATISFIED AT ANY PRICE IT MAY FIX.

The opinion states:

> But the notion that the Government can not make it a condition of allowing the establishment of gas works that its needs and the needs of its instrument the District shall be satisfied at any price it may fix strikes us as needing no answer. The plaintiffs are under no legal obligation to take gas nor is the Government bound to allow it to be furnished. If they choose to take it the plaintiffs must submit to such enhancement of price, if any, as is assignable to the Government's demands.

This statement implies, we most respectfully submit, a state of facts entirely different from those presented on the record. The appellee Gas Company is not a

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Government institution but is a private enterprise doing a public business—one of the public utilities of the District of Columbia, and so recognized by Congress in the Public Utilities Act, 37 Stats., 974, wherein, in paragraphs 1 and 2, it is provided as follows:

> The term "public utility" as used in this section shall mean and embrace * * * gas plant, gas corporation, etc.
> * * * * * * * * *
>
> The term "gas corporation" * * * includes every corporation * * * manufacturing, making, distributing, or selling gas for light, heat, or power, or for any public use whatsoever, * * * except where the gas is made or produced and distributed by the maker on or through private property solely for its own use or the use of its tenants and not for sale to or for the use of others.
>
> Par. 2. That every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. The charge made by any such public utility for *any* facility or service furnished, or rendered, * * * shall be reasonable, just, *and non-discriminatory.*

IN THE MATTER OF THE VALUATION OF THE WASHINGTON GAS LIGHT CO. (the appellee Gas Company), Formal Case No. 56, Order No. 209, May 2, 1917, copies of which report are hereto attached, it was said by the Public Utilities Commission on page 5 of the report:

> The keynote to the law itself (The Public Utilities Law) is found in paragraph 2, and the key words of paragraph 2 are in the phrase, "that

every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate, and in all respects just and reasonable, and that the charge made for the same shall be reasonable, just and non-discriminatory." This paragraph imposed upon the utility in direct terms, for the benefit of *all* the people, the common law duty which it owes, as a calling impressed with a public interest, to furnish reasonable service at reasonable rates. Every line and paragraph of this law is in aid and assistance of paragraph 2. Every inquisitorial right and power given to the Commission; * * * and every duty imposed upon this Commission is to effectuate the right of the community to receive reasonable service at reasonable rates.

In the report of the Utilities Commission on the valuation of appellee Gas Company's property above referred to, nowhere does it appear that one of the considerations for the Government's permission to the Gas Company to do business in the District was that the Government should have gas at any price the latter should fix.

If Congress can fix any rate to be charged for gas furnished the General and District Governments, the rates can, of course, be made so low as to amount to the Governments' receiving their gas free. Now, suppose the demand for gas to be so supplied should be so great as practically to tax the producing capacity of the Gas Company, from what source would it receive funds with which to do business? Not from the Government, because it is not a Government enterprise, nor from the people of the United States as a whole because the gas is not used by all of them; but it is

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respectfully submitted, as must be concluded from the opinion of this Court in the instant case, the only source of revenue would be in the private consumers of gas in the District of Columbia, and if their wants are to be supplied only in the amount allowed by the Government, it would follow that the company would be forced to quit business, and no gas would be available either for the Governments or private consumers.

We respectfully submit that no such a situation was contemplated by Congress when the gas works were permitted to be established, and that this is fully evidenced by subsequent legislation referred to in appellant's briefs.

As was said by this Court in the *Consolidated Gas Case,* 212 U. S., 18, 45, in referring to that company,

> This corporation is one of that class which is subject to regulation by the legislature in the matter of rates, *provided they are not so low as to be confiscatory.*

In the instant case the Government rate and rates to certain other consumers are far below cost of production. Appellants' complaint in this respect *is,* that by reason of present conditions, they are forced to help make up the losses that otherwise the company would sustain by reason of the low rates to others than private consumers, and that the Utilities Commission, having the power, should have fixed rates to *all* users such as to be reasonable and nondiscriminatory.

As pointed out in our original brief, pp. 46, 47, and in our reply brief, pp. 24-26, appellants occupy the position suggested as not appearing in the Consolidated Gas Case, *supra,* p. 54, wherein this Court said:

> But neither the city *nor the consumers are* finding any fault with it (the lower rate to the city).

We respectfully submit that this statement is intended to warrant, and justifies, the assurance that private consumers would have a just ground for questioning the legality of a rate if the discrimination against them and in favor of the Government is one "for which good reasons could not be given."

Indeed, as pointed out in our original brief, pp. 26 and 27, counsel for the Gas Company stated at the hearing that it is but fair that the Government should pay the rate charged to the private consumer. Appellants have never contended for the same rate as that allowed to the Government, but if they are so entitled, as stated by counsel for the Gas Company, certainly, we submit, the other excepted consumers should not be permitted to have their gas at a price far below cost of production, and when such low rates are necessarily at the direct expense of the private consumers.

APPELLANTS' BILL DOES NOT ALLEGE, NEITHER HAVE THEY EVER CONTENDED, THAT THEY ARE ENTITLED TO THE SAME RATE AS CHARGED TO THE GOVERNMENT.

We call attention to this fact for the reason that the opinion of this Court further states:

> We do not consider whether the Commission has power to raise the price to the excepted class because, even if it has, the plaintiffs have no right to require equality with the Government and they have no other ground upon which to found their supposed right.

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As pointed out in our original brief, p. 44, wherein we said:

> So, in the Act of 1916, wherein Congress fixed a temporary rate of 70 cents to the Governments and 75 cents to private consumers in the District of Columbia, a legislative sanction was thereby placed upon a disparity of five cents in favor of the Government. We do not insist that after full investigation (and by this we mean a proceeding strictly in accordance with the requirements of the Utilities Act) the Public Utilities Commission would not be justified in finding that a disparity even greater than five cents would not be unduly discriminatory.

The bill alleged facts showing that the rates to appellants as fixed in the orders complained of are illegal on the grounds, *in addition to that of confiscation*, that—

> 1. They are unduly discriminatory as against the appellants and in favor of the Governments and other excepted consumers who are receiving gas at a price far below cost of production.
>
> 2. They were made by the Commission *in disregard* of the rates charged to the Governments and excepted consumers, and when said Commission should have considered and fixed rates to the latter as well as to the former, and at the same time prescribe reasonable and non-discriminatory rates to *all* users of gas in the District of Columbia *as required* by the Public Utilities Act. See *Sou. Pac. Co.* vs. *Interstate Com. Comm.*, 219 U. S. 433.
>
> 3. The order fixing the 95-cent rate to appellants, being Order No. 314, and the second one complained of, was made by the Commission without the statutory notice having been given to cer-

tain parties to the hearing or investigation. See *Interstate Com. Comm.* vs. *L. & N. R. Co.*, 227 U. S. 88.

It is therefore submitted that the bill set forth the following grounds of illegality of the orders complained of:

1. Confiscation of appellants' property;

2. Undue discrimination against appellants and in favor of the Governments and excepted consumers;

3. Disregard by the Utilities Commission of its statutory powers to consider and adjust rates to the Government and excepted consumers.

4. Failure of said commission to consider and adjust said rates, and its action in placing the burden of increased expenses entirely on the private consumers; and

5. Failure of the Commission to conform to the requirements of the statute as to notice.

We also submit that these questions are squarely presented on the record and at great expense to petitioners, who are entitled to have them all passed upon by this Court, not only on the ground that their correct determination would result in sustaining their cause of action, but they are questions of vital interest to the people of the District of Columbia and should be settled now in order that the Utilities Commission in future investigations may be advised definitely in such matters.

Respectfully submitted,

ROSCOE F. WALTER,
Attorney for Appellants.

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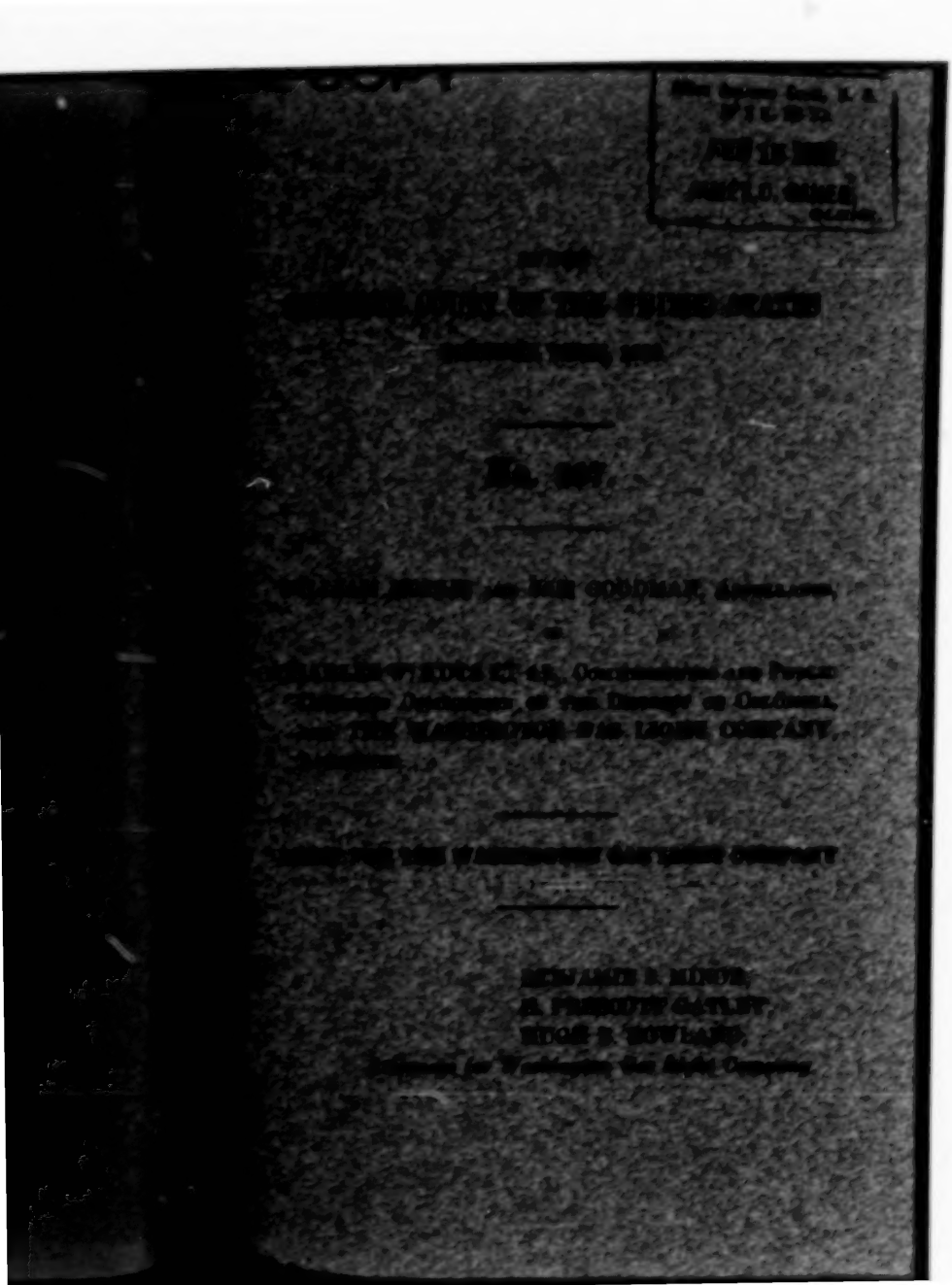
CERTIFICATE OF COUNSEL

The undersigned, attorney for William Hollis and Sam Goodman, appellants in the above-entitled cause, hereby certifies that the above petition for rehearing is made in good faith, and that in his opinion said petition is well-founded in law.

ROSCOE F. WALTER,
Attorney for Appellants.



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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 397.

WILLIAM HOLLIS AND SAM GOODMAN, APPELLANTS,

vs.

CHARLES W. KUTZ ET AL., COMMISSIONERS AND PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, AND THE WASHINGTON GAS LIGHT COMPANY, APPELLEES.

BRIEF FOR THE WASHINGTON GAS LIGHT COMPANY

Statement.

Section 8 of the Appropriation Act of the District of Columbia for the year ending June 30, 1914, approved March 4, 1913 (37 Stat., 974), which section constitutes and is commonly referred to as the Public Utilities Act of the District of Columbia, provides, in paragraph 41, that if,

upon the investigation thereof authorized by paragraphs 38, 39, 40 and 47, the rates and charges of a public utility be found by the Public Utilities Commission unjust, unreasonable or insufficient, it shall have power by its order to substitute therefor such rates and charges as shall be just and reasonable. Paragraphs 46 and 94 provide for the giving of notice by the Commission to the public utility and other interested persons or parties of the time and place of the hearing; while paragraph 64 gives to any public utility, person or corporation interested and who is dissatisfied with the order or decision of the Commission, the right to bring suit in equity in the Supreme Court of the District to vacate, set aside or modify the rates or charges, etc., allowed by the Commission, the right to bring such proceeding being limited (paragraph 65) to 120 days from the entry of the order, and to terminate absolutely at the end of that period.

The bill of the appellants, in paragraphs 7 to 11, inclusive, alleges that in a proceeding before it of the character above indicated, known as Formal Case No. 13, the Commission on March 15, 1918, made an order increasing the rate to be charged for gas to private consumers in the District of Columbia from seventy-five cents to ninety cents per thousand cubic feet. In paragraphs 12 to 16 it alleges that in a subsequent proceeding, known as Formal Case No. 70, the Commission, on March 15, 1919, made an order further increasing the price of gas to private consumers to ninety-five cents per thousand cubic feet. A decree setting aside each of these orders, and requiring the Gas Light Company to refund to the plaintiffs the difference between the rates prescribed by them and the statutory rate of seventy-five cents per thousand cubic feet theretofore prevailing, with

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interest, and for such further relief as the nature of the case may require, was sought by the bill.

The Delay in Bringing Suit Fatal.

The bill was filed May 15, 1919, or fourteen months after the order of the Commission in Formal Case No. 13, although in its seventh paragraph it sets forth that the suit is brought under and by virtue of paragraph 64 of section 8 of the act of March 4, 1913, which act, as stated, requires the suit to be brought within 120 days from the passage of the order complained of and not thereafter.

In an effort to escape the limitation prescribed by the statute upon the period within which the order of the Commission may be attacked, the plaintiffs, on July 8, 1919, after the cause had been argued and decided, amended their bill by the allegation that their suit was instituted "both because they were without any adequate remedy at law, and because paragraph 64 of section 8 of said act of March 4, 1913, creating a Public Utilities Commission of the District of Columbia, expressly provides that any person interested and being dissatisfied with any order or decision of the said Commission fixing any rate or rates, tolls or charges, may commence a proceeding in equity in this Honorable Court against said Commission to vacate or set aside any such decision or order, on the ground that such rate or rates, tolls or charges, complained of fixed in such order is unlawful or unreasonable." This amendment simply adds the additional defect of converting the bill into one with a double aspect, a plaintiff suing under the Public Utilities Act being entitled to a procedure and relief materially different from one suing

only under the general jurisdiction of equity on the ground of the absence of an adequate remedy at law. The theory of the plaintiffs' bill as amended, for example, that, suing under the Public Utilities Act, they may require the Commissioners to furnish them free of cost with a certified transcript of all the proceedings had and testimony taken in the hearing before them, and, when confronted by the objection that their bill was filed nearly a year after the expiration of the time within which the bringing of such suit is limited by the act, that they are also suing under the general jurisdiction of equity because of the absence of an adequate remedy at law, involves an inadmissible departure in pleading and a non-permissible position before any court.

At pages 37-43 of appellants' brief, it is contended that statutes of limitation are inapplicable, and are themselves unconstitutional, where suit is based upon the alleged unconstitutionality of a statute or act. If the plaintiffs, at the expiration of nearly a year after the termination of the time limited by the act for the filing of such suit, may nevertheless bring it by raising a constitutional question, they may equally do so at the expiration of ten, twenty, or any other number of years, and this will be true not only in the present case, but in every other suit or action, otherwise barred by statutes of limitations, but in which the plaintiffs attempt to raise questions of that character. The view of the Supreme Court of Louisiana in Crow *vs.* Supervisors, 141 La., 1017, quoted at page 43 of the brief, we submit, states the unquestionable doctrine; namely, that, while the law-maker must recognize the right of the owners of property to raise all legal and constitutional objections to a measure which they may think proper, it may nevertheless be declared that "the right so

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recognized must be exercised in time and not throughout eternity."

Moreover, since it is a rule of courts of equity to follow the analogy of the Statutes of Limitation in the particular case, it is difficult to see how plaintiffs may wait nearly a year beyond that period, in a matter of public importance like that under consideration and in which delay every month's delay must necessary tend to involve inextricable complication and difficulty, since, if the order was invalid, every consumer of gas in the District of Columbia would be entitled to the same ratio of refund and interest, the plaintiffs could escape dismissal of their bill on the ground of laches, unaccompanied, as it is, either in the record or in the brief, by any attempt either to explain or to justify their delay. Courts of equity, in the absence of fraud, concealment, or other special equities, do not entertain suits after the period at which action at law is precluded by the Statute of Limitations; and, where such special equities are relied upon, the burden of proof as to them rests upon the plaintiff (Kelly *vs.* Boetcher, 85 Fed., 55). A delay of even less than the prescribed period of limitation, unexplained, has in many cases led to dismissal of the bill (Shickler *vs.* Washington Brewery Co., 33 App. D. C., 35-45; Abrahams *vs.* Ordway, 158 U. S., 416, 422; Grymes *vs.* Saunders, 93 U. S., 51-55; Harwood *vs.* Railroad Company, 17 Wall., 78; Mackall *vs.* Richards, 124 U. S., 183).

The Alleged Service to the Government at Less Than the Statutory Rate.

At pages 5 and 45 and elsewhere in appellants' brief it is erroneously stated that the Gas Company furnishes gas to

the United States, the District of Columbia, and others, not private consumers, at a rate below the statutory rate of seventy cents prescribed by the act of September 1, 1916 (39 Stat., 716). This error is due to the inadvertence of failing to observe that the seventy-cent rate is prescribed by said act only with respect to gas furnished for use in any of the public buildings. The seventy-cent rate fixed by the act of September 1, 1916, is substantially a re-enactment, as permanent legislation, of a like provision fixing a seventy-cent rate for gas furnished for use in the public buildings of the United States and of the District of Columbia contained in the District of Columbia Appropriation Acts, approved July 21, 1914, and March 3, 1915, and all subsequent in date to the passage of the Public Utilities Act. The provisions of the acts of 1914 and 1915 refer to the appropriations respectively made thereby, while in the act of September 1, 1916, it is provided "*that hereafter* no part of any money appropriated by this *or any other act*, shall be used," etc. (Italics ours.)

By far the greater part of the gas furnished the United States and the District of Columbia is used for lighting the streets, avenues, roads, alleys, and public spaces, the compensation for which is annually fixed by Congress, beginning in 1910, at a flat rate per annum per lamp, which rate amounts to materially less than seventy cents per thousand cubic feet (36 Stat., pp. 391, 1008-1011; 37 Stat., pp. 154, 952; 38 Stat., pp. 531, 906; 39 Stat., pp. 692, 1020; 40 Stat., p. 931; 41 Stat., p. 849).

By the act, approved March 2, 1911, making appropriations for the District of Columbia for the fiscal year ending June 30, 1912, and for other purposes (36 Stat., pp. 1010,

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1011), it is made the duty of each gaslight company to erect and maintain such street lamps as the Commissioners of the District of Columbia may direct, including lighting and extinguishing of lamps, etc., and failure or refusal in this respect shall subject such gas company to a penalty of twenty-five dollars for each and every day's failure or refusal so to do. The provisions of this act with respect to lighting streets, avenues, etc., have been re-enacted in all of the annual appropriation acts for the District of Columbia since its passage.

The mains, service pipes, and practically the entire distributing plant, or nearly all of it, are placed in the streets, which are the property of the United States; and if a still greater reduction in the price of the gas furnished for public use were required as the condition of such use of the streets by the company, it is difficult to see upon what theory the plaintiffs could maintain a bill for injunction on any claim that their property was thereby being taken without due process of law. And if such a bill were otherwise maintainable, both the United States and the District of Columbia would be indispensable parties to it (Shields *vs.* Barrow, 17 How., 130; Green *vs.* McIntire, 39 App. D. C., 249, 251).

With respect to the claim that gas was furnished to other consumers at a lower rate than that charged the plaintiffs, paragraph 81 of the act permits a lower charge to a corporation conducting a like business, as, for example, the charge by the Washington Gas Light Company for gas sold by it to the Georgetown Gas Light Company. The propriety of such lower charge is based, not merely on the ground that the purchasing company is entitled to some profit upon the resale of the gas so purchased by it, but more especially upon the

ground that it makes distribution thereof through its own mains, service pipes, plant, and services, maintained by it at great cost to itself, which expense of distribution is a material element in the cost of gas at the burners, for which plaintiffs and persons in like situation are charged.

The Plaintiffs Without Standing in Court.

The Public Utilities Act provides three ways by which proceedings may be instituted, namely, (1) by the Commission upon its own initiative (paragraph 38); (2) by a public utility, as in the present case (paragraph 47); and (3) by an interested party upon reasonable complaint against the utility (paragraph 38), whether the matters complained of originate with the utility or grow out of an order of the Commission.

The orders of the Commission which the plaintiffs seek to have set aside were entered in proceedings instituted by the utility after public hearings on the matters referred to in the complaint of the utility.

The fact that the plaintiffs, after due notice as required by law, neither appeared in the hearing before the Public Utilities Commission nor presented to it any of the objections which they now seek to have entertained by the court, is, it is submitted, a further ground incapacitating them from maintaining their bill, and justifying its dismissal. The Public Utilities Act, in both paragraphs 46 and 94, requires the giving of reasonable and proper notice of the hearing to the public utility and to such other interested persons as the Commission shall deem necessary. The bill does not claim any defect or insufficiency in the notice given, or that

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the plaintiffs did not receive it; nor does it in any way indicate, or is it the fact, that the plaintiffs or either of them appeared, either personally or by any representative, before the Commission or in any manner submitted to it the objections, or any of them, now made to granting the increased rate sought, the opportunity to present which objections was and is the sole and only purpose of the requirement of notice contained in the act. The requirement of paragraph 53 of the act, which by the bill is made the basis of the plaintiff's demand for a certified transcript, free of cost to them, of all proceedings had and testimony taken in connection with either of the investigations sought to be reviewed, is, by the terms of the act, to be furnished only, to "any party to such investigation"; while paragraph 67 provides that if, upon appeal to the courts, evidence shall be introduced by the plaintiff differing from that offered before the hearing of the Commission or additional thereto, the Court shall stay proceedings until a copy of such evidence has been furnished the Commission for the purposes of consideration and of an opportunity to alter, modify, amend or rescind the order appealed from. It is, we submit, neither a natural nor a conceivable construction of these provisions of the act that persons interested in the hearing, for that reason required to be given notice thereof, and who are thereupon actually so notified and in effect required to show cause, if they have any, against the proposed increase in rates, may fail to do so, permit protracted investigations, expensive both to the utility and to the Commission, to be carried on through a protracted hearing and a determination duly arrived at, and then a year or more later, or indeed at any time thereafter,

with no excuse for or explanation of their failure to present their objections to the Commission, cast upon the courts the burden of hearing the application for an increase in rates anew, upon objections made and upon evidence to be offered for the first time before the courts, and with the burden also, upon the Public Utility Commission at the expense of the public, of furnishing transcripts, comprising many hundreds of pages, of the evidence adduced before it, both by the utility and by its own experts and representatives, for use in the court proceedings. In accordance both with reason and legal principles, we submit, the courts thus appealed to will not hear new points, propositions or objections which the parties, with every opportunity therefor, did not present to the lower tribunal, and for which omission they present neither explanation nor excuse.

Since the appellants are neither required nor have undertaken to sue on any behalf but their own, and since no decree in their case is or can be conclusive upon any others of the many thousands of gas consumers in the District, if any and all consumers who have not appeared or taken part in the hearings before the Commission, may nevertheless bring suits in succession to impeach the orders made, and at any distance of time where constitutional questions are involved, the utterly impossible position, for the utility, the Commission and the Courts must be apparent.

The Alleged Failure of Notice.

The only claim of any want of notice made by the bill relates to Formal Case No. 70, and that claim is (rec. p. 6) "that on December 10, 1918, at the hearing before the Public

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Utilities Commission in Formal Case No. 70, aforesaid, there was entered the appearance of a certain Roscoe F. Walter, in opposition to the proposed increase in gas rates in such case, the same appearing on behalf of himself, and certain others, citizens of Takoma Park, District of Columbia." It is nowhere alleged that the plaintiffs were among the citizens so represented by Mr. Walter, either as attorney or agent, or that the plaintiffs in any respect sought to intervene or object to the proceedings before the Commission. That the omission to identify themselves with Mr. Walter's representation in the matter was not an inadvertence is evidenced by the fact that, after the case had been fully heard and once decided, at which hearing the fact in question was adverted to, the plaintiffs (rec., p. 23), in the amendment to their bill filed July 8, 1919, again omitted to make any claim that they were included among the persons represented by Mr. Walter on the occasion in question. Neither is it charged that full, adequate and sufficient notice was not given of the second hearing in that case, but only that a promise by the secretary, unauthorized by and unknown to the Commission, to give Mr. Walter a personal notice of a later continuation of the hearing, was not fulfilled, he being at the time of the hearing on an official journey to Santa Fe, and not returning to Washington until the month following the promulgation of the order. Not only does the bill fail to allege that Mr. Walter was at that time the attorney or representative of either of the plaintiffs, but it further omits any charge that they or either of them failed to receive due and actual notice of the hearing in question, or that they relied upon, or ever knew of the alleged promise of the

secretary to him, or that they were in any manner misled or prejudiced thereby. The only mention of a secretary contained in the act is the requirement, in paragraph 97, that he take an oath. Paragraph 95 gives to the Commission the power to prescribe the duties of its various officers, clerks and other employes, among which duties prescribed for the secretary it is not pretended was included the duty or authority to undertake on behalf of the Commission to give special notices to individuals.

What effect could be given by an appellate court to an appeal from a judgment or decree below, in any cause, based upon a claim by the appellant, that he had obtained from a clerk of that court a promise to notify him when the case would come on for hearing, that the clerk had failed to give the promised notice, and that, therefore, the judgment or decree appealed from was void as having been rendered without due process and in violation of the constitutional rights of the appellant?

The Allegation of a Discriminatory and Confiscatory Rate.

This, perhaps the principal charge of the bill, rests upon the theory that the Public Utilities Act gives the Commission power to fix the rate which shall be paid for gas by the United States and by the District as well as by private consumers, and that the raising of the rate to the private consumer to the extent of fifteen, or twenty, cents per thousand cubic feet above the seventy-five-cent rate theretofore prevailing, without any increase in the rate fixed by Congress to be paid by the United States and the District, is confiscatory and a taking of the plaintiffs' property without due process of law.

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In the plaintiffs' brief this question is argued upon the theory that the failure of the Commission to increase the rate to the Government and the District was because of a ruling by that body that it had no power to do so, and that, therefore, the increase made necessary by the increased cost of labor, materials, and the like was to be imposed wholly upon the private consumers. No such ruling by the Commission is alleged in or made an issue in the cause by the bill, which fact, of itself, would seem to be fatal to the contention.

Eliminating this objection then, the only issue in this connection would be whether an increase, first of fifteen cents and then of twenty cents per thousand cubic feet, to private consumers, with no increase in the Government or District rates, is a taking of the plaintiffs' property without due process or other violation of their constitutional rights.

In Wilcox *vs.* Consolidated Gas Co., 212 U. S., 54, the objection urged in opposition to the rate fixed by the Public Utilities Commission was, not as seems to be contended by the learned counsel for the plaintiffs, at pages 43-4 and 46-8 of their brief, whether a difference of five cents per thousand cubic feet between a municipality and private consumers was discriminatory; but, as shown at pages 35-6 of the report, that, since the Commission was bound to allow a reasonable rate to be charged to the private consumer, and had determined eighty cents per thousand cubic feet to be that rate, its order that the Gas Company should furnish gas to the municipality at seventy-five cents per thousand cubic feet was a requirement that it should sell the gas at less than a reasonable rate, and was for that reason confiscatory and a taking of property without due process of law. The court (p. 54), without making any reference to the amount of the

difference in charge in the case before it, said: "Lastly, it is objected that there is an illegal discrimination as between the city and the consumers individually. We see no discrimination which is illegal, or for which good reasons could not be given." And the plaintiffs' brief (p. 44) concedes that after full investigation, which it is not claimed it did not make, the Commission might be justified in finding that a greater difference than five cents per thousand cubic feet would not be unduly discriminatory.

If the appellants concede that the Commission has authority under the Public Utilities Act, after investigation, to fix different rates for the Government and the private consumers, then it would follow that their bill was properly and necessarily dismissed, because it states no facts, or fact, tending to show that the rates fixed for private consumers by the orders of the Public Utilities Commission are excessive, confiscatory or in any way unreasonable, nor any ground upon which a differential rate of twenty-five cents per thousand feet in favor of the Government, from which the Gas Company enjoys not only its corporate franchise, but the free use of the streets of Washington, the property of the Government, for its mains, service pipes and other equipment, is open to legal or just exception.

If the company were required by Congress to remove its mains, service pipes, street boxes, and other plant construction from their present situs in and under the streets and public spaces of the city and to locate them upon or under lands now in private ownership, to be acquired by contract or condemnation on payment of due compensation, could the plaintiffs successfully maintain in the courts that the increased cost of gas to them which would result from the re-

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quirement was a taking of their property without due process or was otherwise in violation of their constitutional rights? To do so would be to rule that the Government owes it to the plaintiffs, as a right conferred upon them by the Constitution, to permit the streets to be used by the Gas Company for the purpose of its distribution plant, in order to cheapen the cost of gas to them.

The Claim That the Public Utilities Act Confers Upon the Commission Authority to Determine the Rate to be Paid by the Government and the District.

If the foregoing propositions, or any of them, are well taken, the question whether the Public Utilities Commission is authorized by the act creating it to prescribe the rates which the Government and the District must pay for gas is immaterial to the decision of this case.

If all those propositions should be determined adversely to the appellees, the bill must nevertheless be dismissed unless the Commission possesses that power.

In the first place, as noted above, no such question is raised by the bill. It contains no such allegation, nor does it allege that the order of the Commission appealed from was not the result of a full investigation by it of the entire subject, or that its conclusion from that investigation was not that a rate of seventy cents to the Government and ninety-five cents to the private consumers would not be, under all the circumstances of the case, a fair, just, and non-discriminatory rate.

We are quite willing, however, to assume for present purposes that this question is before the court for decision. It is one of great public importance, and it is to the interest of the

Commission, the utility, the courts, and the public that, if there is any reasonable doubt upon the subject, it should be set at rest. But, since the United States and the District are vitally interested in this decision, and since no decree establishing the power can be made without necessarily and seriously affecting their interests, the bill must in any case have been amended for the sake of bringing them before the court, as indispensable parties (Shields *vs.* Barrow, 17 How., 130; Green *vs.* McIntire, 39 App. D. C., 249, 251, above cited).

Assuming these obstacles to have been cured, or out of the way, the contention on behalf of the plaintiffs that the Public Utilities Act confers upon the Commission the authority in question appears from their brief to be based laregly, if not wholly, not merely on words spoken in debate of the measure when on its passage through one of the houses of Congress, which the Supreme Court of the United States holds to be inadmissible (United States *vs.* Freight Association, 166 U. S., 290, 317-18), but even upon remarks attributed, in segregated form, to counsel for the utility before the Senate Committee, and even before the Public Utilities Commission itself.

The history of the passage of the act, which has been held admissible for consideration in the construction of statutes, negatives the construction contended for, even as that history is given by the plaintiffs in their brief. It is as follows:

> "Section 6 of the act of September 1, 1916, making appropriations for the expenses of the District for the fiscal year ending June 30, 1917 (39 Stat., 716), was as it left the House in the following form:
>
> " 'SEC. 6. That hereafter no part of any money appropriated by this or any other act shall be used for

> the payment to the Washington Gas Light Company or the Georgetown Gas Light Company for any gas furnished by said companies for use in any of the public buildings of the United States or of the District of Columbia at a rate in excess of seventy cents per thousand (1,000) cubic feet.'"

According to the plaintiffs' brief, though not otherwise in the case, counsel for the Gas Company, before the Senate Committee, objected to the section, and contended that the rate to be paid by the United States and the District should be left to determination by the Public Utilities Commission under the act, which view was accepted by that Committee, and section 6 stricken from the bill as reported by it to the Senate.

The Committee's amendment of the bill (Plaintiffs' Brief, pp. 28-34), by eliminating the section in question, was not concurred in by the Senate, whereupon Senator Norris moved that the section, as restored, be amended by the addition of a distinct and separate paragraph, dealing with a subject not embraced in it as it came from the House, namely, the rates to be charged to private consumers, which amendment prevailed and was accepted by the House, so that section 6 as finally enacted reads as follows:

> "SEC. 6. That hereafter no part of any money appropriated by this or any other act shall be used for the payment to the Washington Gas Light Company or the Georgetown Gas Light Company for any gas furnished by said companies for use in any of the public buildings of the United States or the District of Columbia at a rate in excess of seventy cents per one thousand cubic feet.

"On and after the first day of October, nineteen hundred and sixteen, the Washington Gas Light Company shall not charge or collect for gas furnished a private consumer in any part of the District of Columbia a rate in excess of seventy-five cents per one thousand cubic feet of gas so furnished: *Provided,* That if a consumer of gas other than the Government or the District of Columbia shall not pay monthly any gas bill within ten days after the same shall have been presented, said gas company may charge and collect from any such consumer so failing to pay said gas bill as aforesaid 10 cents additional for each one thousand cubic feet of gas represented by said bill: *And provided further,* That nothing herein contained shall be construed as limiting or taking away any of the powers now vested by law in the Public Utilities Commission of the District of Columbia."

In other words, (*a*) the Senate Committee proposed to amend the bill as it came from the House by striking paragraph 6 from the bill, for the purpose of leaving the determination of the gas rate to be paid by the United States and the District to the Public Utilities Commission; (*b*) the Senate rejected the amendment and restored section 6, thus declining to leave to the Commission the fixing of the Government and municipal rate, and fixing that rate absolutely by statutory enactment; whereupon (*c*) an additional separate paragraph relating to the rates to be charged, not to the Government nor to the District, but to private consumers exclusively, was added by amendment, which separate paragraph provided that nothing contained in it should be construed as limiting or taking away the powers vested by law in the Commission. It is impossible to hold that, after re-

fusing absolutely to leave to the Commission any power to increase or change the seventy-cent rate to the United States and this District, the Senate intended in dealing with a new subject, namely, the rate to be charged private consumers, to recede from its position and refer the entire question of rates, public and private, to the Commission.

It is further to be noted that by the act of February 21, 1871 (16 Stat. at Large, p. 427), applied to the present form of the District Government by the act of June 20, 1874 (18 Stat. at Large, 116), the Commissioners are forbidden "to make contracts to bind said District to the payment of any sums of money except in pursuance of appropriations made by law, and not until said appropriations shall have been made." If the Commission had assumed to contract with the Gas Company to furnish gas to the public buildings and to street and park lamps at a rate in excess of those established by the appropriation acts, it cannot be open to discussion that their act in doing so would have been, not only in violation of section 6 of the act of September 1, 1916, but of the standing statutory enactment restricting their powers in that regard, in force for nearly half a century. It is perhaps, not remarkable that, under these facts and circumstances attending the enactment of the District Appropriation Act of September 1, 1916, and in view of the act of 1871 above cited, the company's counsel admitted (Plaintiffs' Brief, p. 27) that reflection had convinced them that the Commission had not power to regulate or fix the prices paid by the Government, and that what the Government would pay was fixed by its appropriation acts.

And further the prescribing by Congress, year by year, subsequently as well as prior to the Public Utilities Act, and

subsequently as well as prior to the act of 1916, including the Senate amendment of that act, which subsequent acts as well as the prior ones prescribed unequivocally the rate to be paid per lamp, both constitute legislation *in pari materia* with the Public Utilities Act and the act of 1916, and are irreconcilable with the contention that by either of the last named acts Congress intended the prescribing by the Public Utilities Commission of the rates for gas to be paid by the United States or the District of Columbia; and no one of these subsequent acts contains provisions which could by any possibility be construed as subordinating the rates prescribed by them to be paid to such rates as the Public Utilities Commission might ordain.

It is, therefore, respectfully submitted that there was no error in the decree of the Supreme Court of the District of Columbia dismissing the plaintiffs' bill, or by the Court of Appeals of the District of Columbia in affirming the same, and the same should be affirmed by this court.

Respectfully submitted,

BENJAMIN S. MINOR,
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JUN 21 1940
JAMES O. BAKER,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 307.

WILLIAM HOLLIS and SAM GOODMAN, Appellants,

vs.

CHARLES W. HUTT, Chairman; LOUIS BROWNLOW and W. GWYNN GARDINER, Commissioners of the District of Columbia, and as such Constituting the PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, and the WASHINGTON GAS LIGHT COMPANY.

BRIEF FOR PUBLIC UTILITIES COMMISSION, D. C.

P. H. STEPHENS
CONRAD H. SYME,
Attorneys for Public Utilities Commission, D. C.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 397.

WILLIAM HOLLIS AND SAM GOODMAN, APPELLANTS,

vs.

CHARLES W. KUTZ ET AL., COMMISSIONERS, AND PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, AND THE WASHINGTON GAS LIGHT COMPANY, APPELLEES.

BRIEF FOR THE PUBLIC UTILITIES COMMISSION.

By paragraphs 2 and 4 of the Public Utility Act it will be seen that it is the duty of the Utilities to furnish an adequate service at reasonable and non-discriminatory rates, and the Commission is given power to enforce this duty owed by the Utilities to the public. The Commission represents the public and all the public. The Utility represents itself and its own interest. There is no provision in the law under which an individual member of the community can become a party

in law to the controversy unless he files a petition as provided in paragraph 40 of the act.

The procedure by or before the Commission is so clearly described by the Court of Appeals (R., pp. 29-30) that it is unnecessary to repeat it here. This procedure is so complete that every right any individual consumer may have to be heard and his complaint adjudicated is fully preserved and capable of enforcement, as is also his right of appeal to the courts if dissatisfied with the final action of the Commission.

Neither of the complainants here appeared before the Commission.

To hold that any person who so desires may appeal from an order of the Commission, without having ever appeared before it, is to announce a doctrine as novel as it would be dangerous and its adoption would seriously impair the usefulness of the Commission.

If any citizen thinks he is injured by any order of the Commission establishing a rate or a service, he can complain to the Commission, and the Commission is bound to hear his complaint, after notice to the Utility whose rate or service is questioned thereby. If the person complaining does not agree with the order of the Commission made after such hearing, he is given his right of appeal in accordance with section 64 of the act.

If it could be admitted that the plaintiffs in this bill were parties to the proceedings before the Commission, their right of appeal is barred by the statute as to first order complained of, and as to the last order the Court could not hear an appeal from questions which the bill shows were not before the Commission for consideration.

The complainant, although he states in his bill that it is

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founded upon paragraph 64 of the Public Utility Acts, and reiterated this statement to the Court, and although the Court stated that it would consider the bill as so founded, now seeks to change ground and assert the jurisdiction of the Court on general equitable principles. Under this view the whole right of the plaintiff rests entirely upon the question of law, as to whether the Commission had the right or the jurisdiction to impose a rate upon the Government of the United States and the District of Columbia for gas which Congress had specifically fixed, by rendering it unlawful to use public funds for the payment of a higher rate.

If a case can be found where the Interstate Commerce Commission has been given jurisdiction to change a rate fixed by Congress for Government service, or where any State Commission has been given the right to change a rate fixed by the legislature of a State for the service of a State, it would be well that such case should be called to the attention of the Court. Counsel for the Commission has been unable to find such a case.

It is difficult to conceive of a Commission authorized by Congress fixing a rate for Government services unless specifically authorized so to do. It is even more difficult to conceive of the Public Utility Commission, composed of the Commissioners of the District of Columbia, who are the government of the District of Columbia, fixing a rate for the District of Columbia to pay. Such a situation would involve the Commissioners of the District of Columbia as a Public Utilities Commission, passing upon their responsibilities as Commissioners of the District of Columbia in their governing capacity—an inconceivable incongruity. It is beyond controversy that Congress, neither directly nor by

implication, gave the Public Utilities Commission any such authority, either as to the Government or the District. This question is fully discussed in the brief of the Washington Gas Light Co., and the Commission believes its statement of the law is correct.

Reduced to its last analysis, the entire bill of the plaintiff is based upon the proposition that the Commission ought to have increased the rate to the Government and to the District of Columbia, and, therefore, the sole question raised is as to whether it had the right to make such increase. If it did not, there is no ground for complaint. If it had such right and refused to exercise it, the only way the question could possibly be reached would be by some citizen complaining to the Commission that the rates fixed by it were unreasonable to the private consumer for this reason. Such complainant would be entitled to a formal hearing and to present to the Commission any facts warranting such a conclusion, and the Utility would be entitled to a reply. The Commission could then make an order, based upon the facts developed at such hearing, and from this order the complaining citizen is given by the law a right to appeal to this Court. This is the orderly process provided by the Public Utilities Law. It was not followed by the complainants in this case.

It follows from all of the above, in the first place, that the complainants were not parties to the proceeding before the Commission and not entitled to appeal therefrom.

In the second place, if these complainants had been parties, they neglected to avail themselves of their right of appeal within the time limited by the statute.

In the third place, if the complainants endeavor now, in

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spite of the allegations of their bill, to say that they are seeking ordinary equitable relief, they must base such relief, under the allegations of their own bill, upon the right of the Commission to change the rate of gas to the Government and the District of Columbia. If the Court found the Commission has no such right it must dismiss the bill. If the Court found that the Commission had such right it must likewise dismiss the bill, because the complainants must first avail themselves of the right which the law gives them of complaining to the Commission before they can appeal to a court of equity by virtue of the statute.

Respectfully submitted,

F. H. STEPHENS,
CONRAD H. SYME,
Attorneys for the Defendant, the Public Utilities Commission of the District of Columbia.

SUPREME COURT OF THE UNITED STATES.

No. 397.—October Term, 1920.

William Hollis and Sam Goodman, Appellants, vs. Charles W. Kutz, Chairman, Louis Brownlow and W. Gwynn Gardiner, Commissioners of the District of Columbia, and as such constituting the Public Utilities Commission of the District of Columbia, and the Washington Gas Light Company. } Appeal from the Court of Appeals of the District of Columbia.

[March 21, 1921.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill in equity brought by private consumers of gas to have two orders of the Public Utilities Commission that increase the rate for gas to private consumers declared void. The first order, Number 254, March 15, 1918, raised the rate from 75 cents per thousand feet to 90 cents. The second, No. 314, March 15, 1919, raised it to not exceeding 95 cents; the orders being made under the authority of the Act of March 4, 1913, c. 150, § 8, 37 Stat. 938, 974, *et seq.*, establishing the Public Utilities Commission of the District of Columbia and fixing its powers. The bill and the appeal to this Court are said to be based upon Par. 64, of § 8, 37 Stat. 988. It is alleged that the orders violate the plaintiffs' constitutional rights because the rate to be charged to the United States and to the District remains the statutory rate of 70 cents, and to certain other takers still less, and that if the United States and District had paid 90 cents for the year 1918 the Gas Company would have received a return of about six per cent. It is said that the difference is an unlawful discrimination and that the plaintiffs are required to make up the loss incurred by furnishing the gas to the Government and the District at less than cost. The bill was dismissed by the Supreme Court for want of equity and because

not filed within one hundred and twenty days after the entry of the order of March 15, 1918, as required by § 8, Par. 65. The Court of Appeals affirmed the decree on the different ground that a formal complaint and hearing before the Commission were a condition of the right to sue in the courts. The provision in Par. 67 for the transmission of any new evidence taken in the suit to the Commission for its further consideration, and other details, were thought to indicate that the suit was in the nature of an appeal.

We are unable to agree with the opinion of the Court of Appeals. Assuming that the bill is based upon the statute the language of Par. 64 is that any person interested and dissatisfied with any order fixing any rate may commence a proceeding in equity. We do not perceive any advantage in requiring a party to file a complaint asking the Commission to review a decision just reached by it after a public hearing, nor do we see such a requirement in the statute. On the other hand we see no requirement that the plaintiffs in equity should have appeared in the original hearing upon the rate. They are parties to the order equally whether they saw fit to argue the case to the Commission or not, and when they stand upon supposed constitutional rights there seems to be no necessity of raising the point until they get into Court. This suit is not for a revision of details but for a decree that the orders are void as matter of law. That by reason of their pecuniary interest the plaintiffs are persons interested within the statute, may be assumed for the purposes of decision. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 49. S. C. *T. H. Peavey & Co.* v. *Union Pacific R. Co.*, 176 Fed. Rep. 409, 416, 417. See *Detroit & Mackinac Ry. Co.* v. *Michigan Ry. Commission*, 235 U. S. 402.

On the merits however there is no doubt that the decree was right. We do not wish to belittle the claim of a taker of what for the time has become pretty nearly a necessity to equal treatment while gas is furnished to the public. But the notion that the Government cannot make it a condition of allowing the establishment of gas works that its needs and the needs of its instrument the District shall be satisfied at any price that it may fix strikes us as needing no answer. The plaintiffs are under no legal obligation to take gas nor is the Government bound to allow it to be furnished.

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If they choose to take it the plaintiffs must submit to such enhancement of price, if any, as is assignable to the Government's demands. We do not consider whether the Commission has power to raise the price to the excepted class because, even if it has, the plaintiffs have no right to require equality with the Government and they have no other ground upon which to found their supposed right.

Decree affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.